(12)

Supreme Court of the United States

OCTOBER TERM 1941

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

NOTICE OF MOTION FOR LEAVE TO FILE ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

JOHN F. FINERTY,
MORRIS SHAPIRO,
Counsel for Petitioner.

MARTIN A. MARTIN,
THOMAS H. STONE,
Of Counsel.

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ODELL WALLER,

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against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

Motion for Leave to File Petition for an Original Writ of Habeas Corpus

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your petitioner, ODELL WALLER, under sentence to die June 19, 1942, respectfully moves this Court that leave be granted him to file the attached petition for an original writ of habeas corpus.

Your petitioner further respectfully moves this Court that the petition for rehearing heretofore filed in *Waller v. Youell*, No. 1097 of this term, stand as a brief in support of the attached petition for an original writ of habeas corpus.

For the convenience of this Court in passing upon this motion, its attention is respectfully called to the fact that the attached petition for habeas corpus is substantially identical with the petition for habeas corpus heretofore filed with and dismissed by the Supreme Court of Appeals of Virginia, certiorari to review such dismissal having been denied by this Court on May 4th, 1942 by its order in No. 1097. The only changes have been in the following respects:

1. There has been deleted from the petition all allegations with reference to the intent and pattern of the Constitution and laws of Virginia, and only those allegations have been retained which involve the administration in fact of such laws.

2. There has been added:

(a) An allegation, supported by affidavit of petitioner, that he was not asked either by his trial counsel or by the trial court to waive his constitutional rights, and neither intended to, nor did expressly and intelligently consent to waive such rights, but relied on his counsel for adequate protection thereof.

(b) Affidavits of petitioner's trial counsel that they neither intended to waive, nor were they authorized to waive, petitioner's constitutional rights or any jurisdictional questions thereby involved, and at all times intended and endeavored to protect such rights and questions.

(c) Affidavit of Eleanor Bontecou, based on a survey of the poll tax states conducted under the auspices of the William C. Whitney Fund, and the New School for Social Research to determine the effect of poll taxes upon the exercise of the rights of franchise and jury service, with particular reference to the economic disabilities preventing payment of poll taxes by sharecroppers and Negroes.

ODELL WALLER,
Petitioner.

By JOHN F. FINERTY,
MORRIS SHAPIRO,
Counsel for Petitioner.

MARTIN A. MARTIN,
THOMAS H. STONE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

Petition for Writ of Habeas Corpus

To the Honorable the Supreme Court of the United States:

The petition of ODELL WALLER respectfully shows:

1. Petitioner is a citizen of the United States and of the State of Virginia, and, prior to his detention, was a resident of Pittsylvania County, Virginia.

2. Petitioner is now unjustly and unlawfully imprisoned and restrained of his liberty and detained under sentence of death in the custody of Rice M. Youell, Superintendent of the State Penitentiary, Richmond, Virginia.

3. The sole color of authority by which said Rice M. Youell, Superintendent of said penitentiary, so restrains and detains petitioner is a commitment of the Circuit Court of Pittsylvania County, Virginia.

4. Petitioner alleges that said commitment and the proceedings upon which it is based are wholly null and void and without authority in law, and are violative of the

Constitution of the United States, in the following respects and by reason of the following facts:

I.

Said commitment is based upon:

1. An indictment by a special grand jury of said Pittsylvania County, charging petitioner with the murder in the first degree in said county on July 15, 1940 of one Oscar Davis.

2. Petitioner's plea of not guilty to such indictment.

3. A trial before the Circuit Court of said county and a petit jury thereof.

4. A verdict against petitioner by said jury of murder in the first degree and fixing petitioner's punishment at death.

5. Sentence by said Court on such verdict that petitioner be, on December 27, 1940, electrocuted until dead, and commitment of petitioner to the State Penitentiary at Richmond, Virginia, pending his execution.

6. On March 4, 1941, the Supreme Court of Appeals of Virginia granted a writ of error and supersedeas to review said judgment and sentence of the Circuit Court of Pittsylvania County.

7. On October 13, 1941, the Supreme Court of Appeals of Virginia affirmed the judgment and sentence of said Circuit Court.

A copy of the record before said Court on writ of error is attached to petition for certiorari heretofore filed in

this Honorable Court at the October 1941 term No. 1097 made part of this petition, marked Exhibit 1.* Said record contains a copy of said indictment (R. 31-32), a statement of petitioner's plea of not guilty (R. 23), a transcript of the evidence upon trial of petitioner before said Circuit Court (R. 85-127), the verdict of the jury and judgment of the Court, and commitment (R. 23-24).

8. On November 3, 1941, said Court resentenced petitioner to be electrocuted until dead on December 12, 1941. A copy of the order of said Court so resentencing petitioner is attached hereto and made part hereof marked Exhibit 2. That the Governor of the State of Virginia granted a stay of execution from December 9, 1941 to March 20, 1942 in order to permit the petitioner to apply to the Supreme Court of Appeals of Virginia for a writ of habeas corpus.

9. A petition for writ of habeas corpus was heretofore submitted to the Supreme Court of Appeals of the State of Virginia, which said Court, on January 22, 1942, issued its order dismissing the said petition. That the Governor of the State of Virginia granted a further stay of execution to May 19, 1942 in order to permit the petitioner to apply to this Court for certiorari.

10. A petition to this Court for certiorari to review the dismissal of the petition for writ of habeas corpus by the Supreme Court of Appeals of the State of Virginia was denied by order entered on May 4, 1942. That the Governor of the State of Virginia granted a further stay of execution to June 19, 1942 in order to permit the petitioner to file in this Court a petition for rehearing, and this petition for an original writ of habeas corpus.

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* The record of petitioner's trial before the Circuit Court of Pittsylvania County is not reprinted here for the reason that such cost is beyond petitioner's means, and the funds available for these proceedings contributed by interested citizens, are inadequate to meet such additional costs.

11. A petition for rehearing of the order denying certiorari is being filed in this Court on May 25, 1942, and this petition is contingent upon action to be taken by the Court thereon.

II.

The record before the Supreme Court of Appeals of Virginia on petitioner's writ of error shows the following:

1. That upon petitioner's case being called for trial in the Circuit Court of Pittsylvania County, petitioner, by his attorneys, moved the Court to quash the indictment

> "on the ground that said indictment had been returned by a grand jury selected from the poll Taxpayers of Pittsylvania County and that such mode of selection deprived the accused of his right to a trial by a jury of his peers and denied him due process of law and equal protection of the laws in contravention of the 8th Section of the Virginia Bill of Rights and the 14th Amendment to the Constitution of the United States" (R. 31).*

The record then shows that no evidence was offered to support such motion, that the motion was overruled by the Court, and that petitioner's counsel duly excepted (R. 31).

2. That thereupon, petitioner, by his counsel

> "moved the Court to quash the venire facias on the ground that said venire facias had been selected from a list of poll taxpayers of the County of Pittsylvania and that such manner of selection denied him his right to a trial by jury of his peers and deprived him of due process of law and equal protection of the laws, in contravention of the 8th Section of the Virginia Bill of Right(s) and the 14th Amendment to the Constitution of the United States" (R. 32).

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* Record references in this petition are as previously stated to Record before this Court on certiorari in No. 1097, October 10, 1941.

The record further shows that no evidence was offered in support of this motion, that the motion was overruled by the Court, and that petitioner's counsel duly excepted (R. 32).

3. That although said motions to quash the indictment and the venire facias were made upon the ground that the grand jury indicting petitioner and the venire facias from which was drawn the petit jury trying him were selected from poll tax payers of Pittsylvania County, nevertheless, the Supreme Court of Appeals of Virginia, upon writ of error from the judgment of conviction, specifically construed such motions as based on the systematic exclusion of non-poll tax payers. *Waller* v. *Commonwealth,* 178 Va. 294.

4. Thus, upon the calling of his cause for trial in the Circuit Court of Pittsylvania County, and before such trial was entered upon, petitioner's counsel seasonably moved to quash the indictment and to quash the venire facias upon the ground that persons unable to pay their poll taxes were systematically excluded from grand and petit juries in such County, and had been so excluded from the grand jury indicting petitioner, and from the venire facias from which was drawn the jury before whom petitioner was subsequently tried.

5. That, at the time the foregoing motions were made, petitioner's counsel specifically stated that petitioner was of the same general social and economic category as those persons so barred from grand and petit jury service because unable to pay their poll taxes but no evidence was offered in support of this statement (R. 18-19, Exhibit 1, p. 60).

6. That petitioner's counsel in support of such motions, did not offer evidence of such systematic exclusion, being

then of the opinion as shown by their statements of record before the said Circuit Court of Pittsylvania County, and by their affidavits hereto annexed as Exhibits 3 and 4 that the Constitution and statutes of Virginia made the payment of poll taxes a prerequisite to both grand and petit jury service, and while the question had never been expressly decided by the Supreme Court of Appeals of Virginia, counsel believed, as likewise shown by their statements of record to the said Court that their construction of the law was sustained by the decision in *Craft* v. *Commonwealth,* 65 Va. 602.

7. That in failing to offer evidence of such actual exclusion, counsel did not intend to waive the constitutional and jurisdictional questions thereby presented, and were neither asked nor authorized by petitioner to make such waiver; on the contrary, as shown by the petition for writ of error to the Supreme Court of Appeals of Virginia, counsel continued to be of the foregoing opinion as to the law of the State of Virginia, and urged it upon the said Court until, in affirming petitioner's conviction, that Court for the first time expressly held to the contrary.

8. That petitioner's counsel failed to make such proof of exclusion before the Circuit Court of Pittsylvania County due to a bona fide misapprehension as to the law of the State of Virginia and a bona fide mistake therefore as to the procedure necessary to establish the jurisdictional and constitutional questions there raised on behalf of your petitioner.

III.

1. Petitioner alleges that, on the record before the Supreme Court of Appeals of Virginia upon petitioner's writ of error, no question therefore was presented to said Court as to whether non-payers of poll tax were in fact

systematically barred from grand and petit jury service in Pittsylvania County, or were in fact so barred from the grand jury indicting petitioner, or from the petit jury trying petitioner, or from the venire facias or petit jury list from which such petit jury was drawn.

2. Petitioner further alleges that the opinion of said Court on the writ of error affirming petitioner's conviction, consequently did not pass on the question whether non-payers of poll tax were barred in fact from jury service in the respects alleged in the preceding paragraph, but held merely that, under the Constitution and laws of Virginia, non-payers of poll tax were not barred in law from either grand or petit jury service. *Waller* v. *Commonwealth, supra.*

3. Said opinion further shows that said Court held that, on the record before it upon such writ of error, there was no evidence that petitioner had or had not paid a poll tax, and that, therefore, petitioner was in no position to complain of any discrimination, had any discrimination existed. *Waller* v. *Commonwealth, supra.*

IV.

That petitioner has exhausted all remedies available to him in the courts of the State of Virginia, first, by application to the Supreme Court of Appeals of that State for a writ of error to review petitioner's judgment of conviction and second, by application to that Court for a writ of habeas corpus following affirmance of petitioner's conviction upon such writ of error. That application to this Court for certiorari to review the affirmance of petitioner's conviction upon writ of error to the Supreme Court of Virginia would have been useless, since the facts of exclusion, constituting denial of petitioner's constitutional rights, did not appear of record upon such writ of

error to the Supreme Court of Appeals of Virginia and, therefore, would not have appeared of record upon petition for certiorari to this Court.

V.

Petitioner alleges that he is a negro and that at the time of his trial he was twenty-three years of age, and had been for several years preceding, a sharecropper; that, as such, his economic circumstances prevented him from paying a poll tax, and that he had not in fact at any time paid a poll tax and at all times was unable to do so. Petitioner's affidavit in this respect is attached to and made part of this petition, marked Exhibit 5.

VI.

1. Petitioner alleges that persons otherwise eligible for grand and petit jury service under the laws of Virginia, who have not paid poll taxes, are, in fact, systematically barred in Pittsylvania County, Virginia, from serving either as grand or petit jurors, and were, in fact, so barred from the grand jury indicting petitioner and from the petit jury before which petitioner was tried.

2. Petitioner alleges that, of the seven persons serving on the special grand jury by which petitioner was indicted, all had paid poll taxes, and all except one had paid poll taxes for the years 1938, 1939 and 1940, which such one, though apparently in default in his poll taxes for said years, had paid poll taxes for the year 1937.

3. Petitioner alleges that all persons on the petit jury before whom defendant was tried and all persons upon the venire facias from which said petit jury was drawn, had paid their poll taxes in full for the years 1938, 1939 and 1940.

4. Petitioner further alleges that the persons summoned by said venire facias were taken from a jury list compiled by the jury commissioners of Pittsylvania County in purported compliance with Section 4895 of the Code of Virginia; that said jury list contained the name of no person who had not paid a poll tax; that all names appearing on said jury list were names of persons appearing on the poll tax list of Pittsylvania County and no others; that said poll tax list contained the names of all persons who had paid poll tax for the year 1940 and within a period of two years preceding 1940, and of no other persons; that such poll tax lists were the exclusive source from which said jury commissioners drew the names appearing on said jury list; and that jury lists in Pittsylvania County are habitually so compiled, and thereby non-payers of poll taxes are habitually and systematically excluded from juries in said County.

Petitioner further alleges that, for the purpose of obtaining like information as to the jury list of Pittsylvania County for 1939, counsel for petitioner attempted to examine the list compiled by the jury commissioners of Pittsylvania County for said year, which, petitioner is informed and believes, is in the custody of the Clerk of the Circuit Court of Pittsylvania County; that said Clerk refused counsel access to such jury list, stating that he so refused by direction of the judge of said Circuit Court, the Honorable J. T. Clement.

5. The affidavit of Martin A. Martin, setting forth the facts alleged in this section of the petition, is attached to and made a part hereof marked Exhibit 6.

VII.

1. Petitioner alleges that the Constitution and laws of Virginia, although construed by the Supreme Court of Appeals of that State not in law to require such exclusion,

have been administered in fact to exclude systematically from service as grand and petit jurors, a numerous and wide-spread class of citizens otherwise qualified, who, because of the disabilities common to the economic status of their class, have been unable to and have not paid poll taxes as required by such Constitution and laws.

2. Petitioner alleges that, while negroes and share-croppers are not, as such, so barred from service as grand and petit jurors, they, because of their similar economic status, constitute a large proportion of the class of persons so barred as grand and petit jurors, and that petitioner himself is of such economic class so barred.

3. Petitioner alleges that such economic class who are unable and do not pay poll taxes and who are thereby barred from serving as grand and petit jurors, is so numerous and widespread that, in Pittsylvania County, Virginia, with a population for the year 1940 of approximately 30,000 persons over 20 years of age, only approximately 6,000 were able to pay and did pay their poll taxes, and were thereby eligible in law to vote, and in fact to serve and grand and petit jurors. That of the remaining 24,000 persons, non-payment of poll taxes was due principally and primarily to the economic status of such persons.

4. See affidavit of Martin A. Martin, setting forth the facts alleged in this section of the petition, attached to and made part hereof marked Exhibit 6. (See also affidavit of Eleanor Bontecou, attached to and made part of this petition marked Exhibit 7.)

VIII.

Petitioner alleges that, by reason of all the foregoing facts and circumstances, petitioner's commitment and the proceedings upon which it is based are wholly null and

void and without authority in law, and are violative of the Constitution of the United States in the following respects:

1. In violation of the Fourteenth Amendment of the Constitution of the United States in that petitioner has been deprived of his liberty, and would be deprived of his life, without due process of law and without equal protection of the laws in the following respects:

(a) By reason of the fact that there were unlawfully and systematically excluded from the grand jury indicting petitioner a numerous and widespread class of citizens of Virginia and residents of Pittsylvania County, otherwise qualified, solely because of their non-payment of poll taxes, such non-payment arising out of the disabilities common to the economic status of their class, of which class petitioner is one.

(b) By reason of the fact that there were unlawfully and systematically excluded from the petit jury trying petitioner a numerous and widespread class of citizens of Virginia and residents of Pittsylvania County, otherwise qualified, solely because of their non-payment of poll taxes, such non-payment arising out of the disabilities common to the economic status of their class, of which class petitioner is one.

WHEREFORE, by reason of the foregoing allegations, your petitioner prays that a writ of habeas corpus issue from this Honorable Court, to be directed to Rice M. Youell, Superintendent of the State Penitentiary, Richmond, Virginia, aforesaid, and whomever may hold your petitioner in custody, commanding him and them to have the body of your petitioner before this Honorable Court on a date to be fixed by said Court, for the purpose of inquiring into the cause of the commitment and detention of your

petitioner, and to do and abide such order as this Court may make in the premises.

Your petitioner further prays this Court that thereupon your petitioner should be granted a discharge from such custody.

ODELL WALLER,
Petitioner.

By JOHN F. FINERTY,
MORRIS SHAPIRO,
Counsel for Petitioner.

MARTIN A. MARTIN,
THOMAS H. STONE,
Of Counsel.

Exhibit 1.

(Refer to footnote on page 5.)

Exhibit 2.

VIRGINIA:

IN THE SUPREME COURT OF APPEALS HELD AT THE COURT LIBRARY BUILDING IN THE CITY OF RICHMOND ON THURSDAY THE 22ND DAY OF JANUARY, 1942.

This day cama Odell Waller, by counsel, and presented to the court his petition that a writ of habeas corpus issue directed to Rice M. Youell, Superintendent of the State Penitentiary, and whomever may hold said petitioner in custody, commanding him and them to have the body of petitioner before this court for the purpose of inquiring into the cause of the commitment and detention of said petitioner, with which petition were filed certain exhibits, to-wit: the record of the trial and conviction of petitioner in the Circuit Court of Pittsylvania county, the judgment in which was affirmed by this court on the 13th day of October, 1941; copy of order of the Circuit Court of Pittsylvania county, dated the 11th day of November, 1941, resentencing the petitioner; affidavit of petitioner dated the 3rd day of December, 1941; and affidavit of Martin A. Martin, dated the 3rd day of December, 1941; and the court having maturely considered the said petition and exhibits therewith, is of opinion that the said writ of habeas corpus should not issue as prayed. It is therefore considered that the said petition be dismissed.

A copy, Teste:

(Signed) M. B. Watts Clerk

Exhibit 3.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

STATE OF VIRGINIA
CITY OF RICHMOND } ss.:

THOMAS H. STONE, being duly sworn, deposes and says:

That your deponent is an attorney-at-law, duly licensed to practice in the State of Virginia and that he maintains an office and resides at Richmond, Virginia.

That your deponent has read the annexed petition and affidavit of Odell Waller and verily believes the same to be true and correct in all respects.

That your deponent, together with J. Byron Hopkins, Esq., also an attorney duly admitted to practice in the State of Virginia, acted as counsel for said Odell Waller at the time of his indictment and trial in the Circuit Court of Pittsylvania County, State of Virginia.

That, upon calling of the cause for trial and before such trial was entered upon, such counsel seasonably moved to quash the indictment and to quash the venire facias upon

the grounds that persons unable to pay their poll taxes were systematically excluded from grand and petit juries in such county, and had been so excluded from the grand jury indicting petitioner, and from the venire facias from which was drawn the jury before whom the petitioner was subsequently tried; that petitioner himself was of the same general social and economic category as those excluded and similarly unable to pay his poll taxes; that thereby petitioner would be denied equal protection of the law and due process of law, in violation of the 14th Amendment to the Constitution of the United States.

That counsel, however, in support of such motions, did not offer evidence of such systematic exclusion, being then of the opinion, as shown by their statements of record before said Court, that the Constitution and statutes of Virginia made the payment of poll taxes a prerequisite to both grand and petit jury service; that, while the question had never been expressly decided by the Supreme Court of Appeals of Virginia, counsel believed, as likewise shown by their statements of record to said Court, that their construction of the law was sustained by the decision in Craft v. Commonwealth, 65 Va. 602.

That, neither in failing to offer evidence of such actual exclusion nor otherwise, did counsel intend to waive the constitutional and jurisdictional questions thereby presented, and were neither asked nor were authorized by said Waller to make such waiver.

That, on the contrary, as shown by the petition for writ of error to the Supreme Court of Appeals of Virginia, counsel continued to be of the foregoing opinion as to the law of Virginia, and urged it upon said Court, until, in affirming petitioner's conviction, that Court expressly and, for the first time, held to the contrary.

Exhibit 3.

That, therefore, counsel failed to make such proof of exclusion before the Circuit Court of Pittsylvania County, due to a bona fide mistake as to the law of Virginia and to a bona fide mistake as to the procedure necessary to establish the constitutional and jurisdictional questions there raised on behalf of petitioner.

THOMAS H. STONE

Sworn to before me this
22nd day of May, 1942.

V. M. STERLING, Notary Public.
My Commission expires
January 21, 1945

(Seal)

Exhibit 4.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

STATE OF VIRGINIA
COUNTY OF HENRICO } ss.:

J. BYRON HOPKINS, being duly sworn, deposes and says:

That your deponent is an attorney-at-law, duly licensed to practice in the State of Virginia and that he maintains an office and resides at Richmond, Virginia.

That your deponent has read the annexed petition and affidavit of Odell Waller and verily believes the same to be true and correct in all respects.

That your deponent, together with Thomas H. Stone, Esq., also an attorney duly admitted to practice in the State of Virginia, acted as counsel for said Odell Waller at the time of his indictment and trial in the Circuit Court of Pittsylvania County, State of Virginia.

That, upon calling of the cause for trial and before such trial was entered upon, such counsel seasonably moved to quash the indictment and to quash the venire facias upon

the grounds that persons unable to pay their poll taxes were systematically excluded from grand and petit juries in such county, and had been so excluded from the grand jury indicting petitioner, and from the venire facias from which was drawn the jury before whom the petitioner was subsequently tried; that petitioner himself was of the same general social and economic category as those excluded and similarly unable to pay his poll taxes; that thereby Waller would be denied equal protection of the law and due process of law, in violation of the 14th Amendment to the Constitution of the United States.

That counsel, however, in support of such motions, did not offer evidence of such systematic exclusion, being then of the opinion, as shown by their statements of record before said Court, that the Constitution and Statutes of Virginia made the payment of poll taxes a prerequisite to both grand and petit jury service; that, while the question had never been expressly decided by the Supreme Court of Appeals of Virginia, counsel believed, as likewise shown by their statement of record to said Court, that their construction of the law was sustained by the decision in Craft v. Commonwealth, 65 Va. 602.

That, neither in failing to offer evidence of such actual exclusion or otherwise, did counsel intend to waive the constitutional and jurisdictional questions thereby presented and were neither asked nor were authorized by said Waller to make such waiver.

That, on the contrary, as shown by the petition for writ of error to the Supreme Court of Appeals of Virginia, counsel continued to be of the foregoing opinion as to the law of Virginia, and urged it upon said Court, until, in affirming petitioner's conviction, that Court expressly and, for the first time, held to the contrary.

Exhibit 4.

That, therefore, counsel failed to make such proof of exclusion before the Circuit Court of Pittsylvania County, due to a bona fide mistake as to the law of Virginia and to a bona fide mistake as to the procedure necessary to establish the constitutional and jurisdictional questions there raised on behalf of petitioner.

J. Byron Hopkins

Sworn to before me this
22nd day of May, 1942.

B. A. Depnas, Notary Public.
My Commission expires August 7, 1943

(Seal)

Exhibit 5.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

STATE OF VIRGINIA
COUNTY OF HENRICO } ss.:

ODELL WALLER, being duly sworn, deposes and says as follows:

That he is a citizen of the United States and of the State of Virginia, and prior to his detention, was a resident of Pittsylvania County, State of Virginia. That your deponent is now imprisoned and detained under sentence of death, in the custody of RICE M. YOUELL, Superintendent of the State Penitentiary, Richmond, Virginia. That your deponent is a Negro. That prior to his detention, his occupation was that of a sharecropper. That at the time of his indictment and trial, your deponent was upwards of twenty-three years of age. That your deponent has not now or at any time heretofore, paid his poll taxes, and has been unable so to do by reason of his economic status.

Exhibit 5.

That, at the time petitioner's counsel moved before the Circuit Court of Pittsylvania County to quash petitioner's indictment and to quash the venire facias from which was drawn the jury before whom deponent was subsequently tried, deponent was not asked either by his counsel or by the Court to waive the constitutional and jurisdictional questions presented by such motions, nor did he authorize such waiver, nor intend that any such waiver should be made, but, at all times, desired and intended that all of his constitutional rights should be fully protected, including any jurisdictional questions thereby involved.

ODELL WALLER

Sworn to before me this
22nd day of May, 1942.

WILLIAM J. BRYAN
Notary Public,
City of Richmond, Va.
My Commission expires Oct. 25, 1942.

(Seal)

Exhibit 6.

IN THE
SUPREME COURT OF APPEALS OF VIRGINIA

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

STATE OF VIRGINIA
COUNTY OF HENRICO } ss.:

MARTIN A. MARTIN, being duly sworn, deposes and says as follows:

That your deponent is an attorney at law, duly licensed to practice in the State of Virginia, and maintains an office and resides at Danville, Virginia. That your deponent has read the annexed petition of ODELL WALLER, and verily believes the same to be true and correct in all respects.

That your deponent examined the records in the office of the Clerk of the Circuit Court of Pittsylvania County, with respect to the payment of poll taxes by the grand and petit jurors who indicted and tried the petitioner herein. That such examination disclosed that of the seven persons serving on the special grand jury by which petitioner was indicted, all had paid poll taxes, and all except one had paid poll taxes for the years 1938, 1939 and 1940, while such one, though apparently in default for his poll

taxes for said years, had paid his poll tax for the year 1937. That such examination further disclosed that all persons on the petit jury before whom the defendant was tried, and all persons upon the venire facias from which the said petit jury was drawn, had paid their poll taxes in full for the years 1938, 1939 and 1940. That the persons summoned upon the said venire facias were taken from a jury list compiled by the Jury Commissioners of Pittsylvania County; that said jury list contained the name of no person who had not paid a poll tax; that all names appearing on said jury list were names of persons appearing on the poll tax list of Pittsylvania County, and no others; that the said poll tax list contained the names of all persons who had paid poll tax for the year 1940, and within a period of two years preceding, and no other persons; and upon information and belief that such poll tax list was the exclusive source from which the said Jury Commissioners drew the names appearing on said jury list, and such jury lists in Pittsylvania County are habitually and regularly so compiled.

That for the purpose of obtaining like information as to the jury list of Pittsylvania County for the year 1939, your deponent attempted to examine the list compiled by the Jury Commissioners of the said County, which deponent is informed and verily believes is in the custody of the Clerk of the Circuit Court of Pittsylvania County; that said Clerk refused your deponent access to such jury list, stating that he so refused by direction of the Judge of said Circuit Court, the Honorable J. T. Clement.

That your deponent further examined the records in the office of the Treasurer of Virginia and in the branch office of the United States Bureau of Census at Richmond, Virginia, and ascertained therefrom that in Pittsylvania

Exhibit 6.

County, with a population for the year 1940 of 28,989 persons over twenty years of age, only 5,929 persons were able to and did pay their poll taxes and were thereby eligible in law to vote.

MARTIN A. MARTIN

Sworn to before me this
22nd day of May, 1942.

B. A. CEPNAS, Notary Public.
My Commission expires August 7, 1943

(Seal)

Exhibit 7.

City of Washington
District of Columbia } ss.:

ELEANOR BOXTECOU, being duly sworn, deposes and says:

That for the past two years she has been engaged in a study of the operation of the suffrage laws in the Southern states. This research was financed by the William C. Whitney Fund and conducted under the auspices of the New School for Social Research of New York City. The field work in this study was planned and carried on in cooperation with the Carnegie Foundation which was conducting a study of the Negro in America.

Particular attention was paid to the operation of the poll tax laws in the eight states where the tax is made a prerequisite to the right to vote. Statistics show that in poll tax states only about 20 per cent of the adult population vote, as against about 70 per cent in adjoining non-poll tax states. In this connection all available written data was consulted relating to wages and income of share-croppers and agricultural laborers in those states in order to determine the extent to which the poll tax operates as an economic as well as a political burden upon these groups. The field worker for the study, who travelled for six months in the poll tax states was also requested to collect all possible data as to current rates of wages and income levels in the counties visited. To this end he interrogated county officials and local representatives of the Federal Department of Agriculture and of the Works Progress Administration, and also questioned members of the groups, selected at random.

Deponent further states that in the present affidavit she relies principally upon the following for the statistical data presented: The United States Census of Population of 1930, the United States Census of Agriculture for 1935, the reports of the National Resources Committee of the

Exhibit 7.

Federal Government on Consumer Incomes in the United States, and Consumer Expenditures in the United States, and the testimony submitted by the United States Department of Agriculture to the Senate Committee on Education and Labor at Washington, in May 1940. No other statistical reports have been found which contradict or radically differ from the above.

Deponent further states the following, upon information and belief:

All statistical studies reveal that income in the poll tax states, whether measured by per capita or family receipts, is far below the average for the United States. Further analysis of the more general studies indicates that these low income averages are due in large part to the extreme poverty of certain groups who constitute a large part of the population in these states; that is, the share-croppers and agricultural laborers.

In the South white families with less than $750 annual income and Negro families with less than $500 annually have usually had to spend more than their incomes upon the necessities of living. 47.5% of all farm families in the South and 53.1% of all Negro families in Southern rural communities have received less annual income than the amount found to be required for solvency.

The range of income of share-croppers and agricultural wage laborers is as follows:

Share-croppers received in the years 1932 to 1937 inclusive from $193 income annually to $608. This high figure was received in only one area, the South Carolina coastal Plain. Cash income for this group varied in the same period from $119 annually for each family to $367.

Wage laborers in the same areas in those years received family income of from $193 to $405 annually. Cash income for this group was from $126 to $292 a family.

Exhibit 7.

In 1935 there were at least 1,035,921 share-croppers and agricultural wage laborers in the poll tax states. In many of the counties where the plantation system still prevails these groups constitute a large majority of the population. The large majority of negroes are unable to pay poll taxes, and a large proportion of non-poll tax payers are negroes.

The reports of the field worker referred to above corroborated and supplemented the generalities of statistical data. In many of the counties visited agricultural wages were found to be from 50 to 75 cents a day for a ten hour day. Work was not available at all times of the year. In a number of the counties the number of families receiving an income of less than $400 a year was reported to be from 1000 to 3000. Examination of voters lists and other county records showed that very few share-croppers or wage laborers had in fact paid the poll tax, and interviews with individuals confirmed the statistical data which indicated that in many cases such payment was a financial impossibility or could be made only by the sacrifice of some need of decent living. Where the poll tax was cumulative many of the members of these groups found themselves permanently barred not only from voting but from participation in local government, including the right to serve on juries, since either by statute or administrative practice poll tax payment is made the prerequisite to participation in these activities.

ELEANOR BONTECOU

Subscribed and sworn to before me at
Washington, D. C., on May 21st, 1942.

GEO. B. EARNSHAW
Notary Public, D. C.
My Commission Expires Sept. 17, 1943.

(Seal)

No. 1097

Supreme Court of the United States

OCTOBER TERM 1941

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

JOHN F. FINERTY,
Counsel for Petitioner.

THOMAS H. STONE,
MORRIS SHAPIRO,
MARTIN A. MARTIN,
Of Counsel.

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Appendix

Table of Cases Cited

Statutes Cited

All provisions of the Constitution and Code of Virginia, cited herein, are appended to the brief filed in support of this petition.

Supreme Court of the United States

OCTOBER TERM 1941

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorable the Supreme Court of the United States:

ODELL WALLER respectfully petitions this Court for the issuance of a writ of certiorari directed to the Supreme Court of Appeals of Virginia to review the final judgment of that Court of January 22nd, 1942, dismissing the petition of said Odell Waller for a writ of habeas corpus, *Waller* v. *Commonwealth,* 178 Va. 294.

Summary of Matters Involved.

Petitioner, a negro sharecropper, was indicted on July 15, 1940 by a special grand jury at Pittsylvania County, Virginia, for the alleged murder in the first degree of one Oscar Davis, his former white landlord. (Tr. 1, 2.)*

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* References herein are to pages of the certified transcript of record from Supreme Court of Appeals of Virginia, filed with this petition pursuant to Rule 38 (1) of this Court.

Petitioner pleaded not guilty, was tried before a petit jury of the Circuit Court of Pittsylvania County, found guilty, and his punishment fixed at death. The Court sentenced petitioner to be electrocuted on December 27, 1940, and, in the meantime, to be committed to the State Penitentiary at Richmond, Virginia (Tr. 2).

The Governor of Virginia stayed petitioner's execution to March 14, 1941 in order to permit petitioner to apply to the Supreme Court of Appeals of Virginia for a Writ of Error.

On March 4, 1941, said Supreme Court of Appeals granted a Writ of Error and Supersedeas (Tr. 2).

On October 13, 1941, that Court affirmed the judgment and sentence of the Circuit Court, *Waller* v. *Commonwealth*, *supra*. Thereupon, the Circuit Court resentenced petitioner to be electrocuted on December 12, 1941 (Tr. 20), but the Governor granted a further stay of execution to March 20, 1942 to permit petitioner to file a petition for a writ of habeas corpus.

A petition for habeas corpus, supported by affidavits as to the factual allegations, was accordingly filed in said Supreme Court of Appeals, on January 12, 1942 (Tr. 1-23).

On January 22, 1942, the Court, without requiring any return or answer by respondent, dismissed the petition, its order merely stating that

> "• • • the court having maturely considered the said petition and exhibits therewith, is of opinion that said writ of habeas corpus should not issue as prayed. It is therefore considered that said petition be dismissed". (Tr. 24)

This petition for certiorari is directed to such judgment of dismissal.

Upon the preceding writ of error, the Supreme Court of Appeals had affirmed the Circuit Court's denial of petitioner's separate motions upon trial to quash the indictment and to quash the *venire facias*, based on petitioner's allegations that both the grand jury and the *venire facias* had been

> "'selected from the poll taxpayers of Pittsylvania County and that such mode of selection deprived the accused of his right to a trial by a jury of his peers and denied him due process of law and equal protection of the laws in contravention of the * * * 14th Amendment to the Constitution of the United States.'" (Tr. 18-19 Exh. 1, pp. 31, 32)*

The Supreme Court of Appeals held that non-payers of poll taxes were not, as petitioner contended, barred as a matter of law from grand and petit jury service, but refused to determine whether nevertheless, they were barred as a matter of fact, since petitioner had offered no such evidence in support of his motions to quash, nor any evidence that the petitioner was himself a non-payer of poll taxes, *Waller* v. *Commonwealth, supra.*

Thereupon petitioner filed his petition for habeas corpus in the Supreme Court of Appeals,** alleging that, in fact, non-payers of poll taxes were systematically barred from grand and petit jury service in Pittsylvania County, and had been so barred from the grand jury indicting petitioner and from the petit jury trying him (Tr. 1-23). The

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* The Supreme Court of Appeals construed both motions as based on *exclusion* of non-payers of poll taxes, and not merely on *inclusion* of poll tax payers. See Point III of argument in brief filed in support of this petition for certiorari.

** The Constitution of Virginia, Sec. 88, (Virginia Code 1936, App. p. 2352) confers original jurisdiction on the Supreme Court of Appeals "in cases of habeas corpus" etc.

allegations of the petition in this respect were supported by the affidavit of Martin A. Martin, one of the petitioner's counsel, such affidavit showing in detail the evidence in support of such allegations as disclosed by affiant's examination of the records of the Clerk of the Circuit Court of Pittsylvania County (Tr. 22, 23).

It is assumed that, for the purposes of this petition for certiorari, the sworn allegations of fact of the petition for habeas corpus will be taken as true, since the Supreme Court of Appeals dismissed that petition without requiring any return or answer by respondent, and solely on the ground that the petition was insufficient on its face to entitle the petitioner to the writ. Cf. *Whitten* v. *Tomlinson*, 160 U. S. 231.

Indeed, the reasons for the presumption of the truth of the sworn facts alleged in the petition for habeas corpus are stronger here than in the ordinary case. It can hardly be assumed that the Supreme Court of Appeals, had it any doubt of the truth of those facts, would not have afforded the respondent an opportunity to challenge them and thereby have put the petitioner on proof of them. Otherwise, it would be necessary to assume that that Court not only permitted, but compelled, the presentation of grave constitutional questions to this Court, upon a case which it had reason to believe might prove moot. Moreover, the very nature of the facts alleged was such as to put a particular responsibility on the Supreme Court of Appeals in this respect, since those facts related to the administration of justice in its subordinate courts, a subject peculiarly within its concern and knowledge.

The petition for habeas corpus alleged in substance:

A. That petitioner is a negro who, at the time of his trial, was 23 years old and had been, for several years

preceding his trial, a sharecropper; that, as such, his economic circumstances prevented him from paying a poll tax and that he had not, in fact, at any time paid a poll tax, and was at all times unable to do so. (Tr. 6) Petitioner's affidavit in these respects was attached to the petition (Tr. 21).

B. That persons, otherwise eligible for grand and petit jury service under the laws of Virginia, who have not paid poll taxes, are in fact systematically barred in Pittsylvania County, Virginia, from serving either as grand or petit jurors, and were in fact so barred from the grand jury indicting petitioner and from the petit jury trying him (Tr. 7).

That, of the seven persons serving on the special grand jury by which petitioner was indicted, all had paid poll taxes, and all except one had paid such taxes for the years 1938 to 1940, both inclusive. Such one, though apparently in default for those years, had paid poll taxes for the year 1937 (Tr. 7).

That all persons on the petit jury before whom defendant was tried, and all persons upon the *venire facias* from which said petit jury was drawn, had paid their poll taxes in full for the years 1938 to 1940, both inclusive (Tr. 7).

That the persons summoned by said *venire facias* were taken from the jury list compiled by the jury commissioners of Pittsylvania County, in purported compliance with Section 4895 of the Code of Virginia; that said jury list contained the name of no person who had not paid poll taxes; that all names appearing on said jury list were names of persons appearing on the poll tax list of Pittsylvania County, and no others; that said poll tax list con-

tained the names of all persons who had paid poll taxes for the year 1940 and within a period of two years preceding 1940, and of no other persons; that such poll tax lists were the exclusive source from which said jury commissioners drew the names appearing on said jury list; that the jury lists in Pittsylvania County are habitually so compiled, and thereby non payers of poll taxes are habitually and systematically excluded from juries in said county (Tr. 7, 8).

The foregoing allegations, stated under "B" herein, were supported by the affidavit previously referred to of one of petitioner's counsel, Martin A. Martin (Tr. 22, 23).

C. That while the Constitution and laws of Virginia, as construed by the Supreme Court of Appeals of Virginia, in its opinion on petitioner's writ of error, *Waller* v. *Commonwealth, supra,* do not expressly make payment of poll taxes, nor therefore the right to vote, a qualification *in law* for either grand or petit jurors, such Constitution and laws, as shown by the allegations of the petition summarized under "B" herein, have not only been administered, so as to make payment of poll taxes, and thereby the right to vote, a qualification *in fact* for grand and petit jurors, but such Constitution and laws have been designed to permit them to be so administered, by means of the wide discretion conferred upon judges and jury commissioners in the selection of grand and petit jurors, respectively. The applicable sections of the Constitution and laws are specified in the petition (Tr. 11-14). They are too lengthy and complex to be set out herein, but are appended verbatim to the brief filed in support of this petition.

D. That the Constitution and laws of Virginia providing for a poll tax are in themselves unlawful and invalid

by reason of the following facts and circumstances (Tr. 8-11):

That the Act of Congress of January 26, 1870, 16 St. p. 62, readmitting the State of Virginia to representation in the Congress of the United States, provided, among other things that

> "* * * the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who are entitled to vote by the constitution herein recognized, except as punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said state; provided, that any alteration of said constitution, prospective in its effects, may be made in regard to the time and place of residence of voters."

That these provisions of the Act of January 26, 1870 are within the powers of Congress under Section 5 of the 14th Amendment and Section 2 of the 15th Amendment to the Constitution of the United States.

That the Constitution of the State of Virginia mentioned in the Act of January 26, 1870, as then in effect, made no provision for a poll tax and that, under said Constitution, all citizens, otherwise entitled to vote, were entitled to vote without payment of any poll tax.

That by sections 18, 19, 20, 21 of the Constitution of Virginia of 1902,* that state for the first time provided either in its Constitution or any other law, for the payment of a poll tax and for making the payment of such poll tax a qualification for the right to vote.

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* All of the provisions of the Constitution and Codes of Virginia specified in the petition for habeas corpus are set out verbatim in an appendix to the brief filed in support of this petition.

That provisions of the Virginia Code contemporaneously enacted, as well as provisions in force at the time of the indictment and trial of petitioner, all of which are specifically referred to in the petition, but are too lengthy to be here set out*, likewise make the payment of poll taxes a qualification for the right to vote.

That it was the avowed purpose of the Constitutional Convention of Virginia, which adopted the Constitution of 1902, to amend the suffrage clause of the then existing constitution so as to deprive, *inter alia*, negroes of the right to vote. That in such convention Delegate (now United States Senator) Carter Glass stated:

> "The chief purpose of this Convention is to amend the suffrage clause of the existing Constitution. It does not require much prescience to foretell that the alterations which we shall make will not apply to 'all persons and classes without distinction'. We were sent here to make distinctions. We expect to make distinctions. We will make distinctions." (Proc. Const. Conv. p. 14)
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> • • •
>
> "I declared then (referring to the beginning of the convention and the debate on the oath) that no body of Virginia gentlemen could frame a constitution so obnoxious to my sense of right and morality that I would be willing to submit its fate to 146,000 ignorant negro voters (great applause) whose capacity for self-government we have been challenging for thirty years past". (Idem, p. 3257)

That, pursuant to the purpose of said Constitutional Convention to deprive citizens and classes of citizens of their previously existing right to vote and of their civil and political rights and public privileges, including the right of jury service, such convention eliminated from the

Bill of Rights of the Constitution of Virginia of 1902 the provisions of Section 20 of the Bill of Rights of the then existing Constitution of Virginia, that

> "20. That all citizens of the state are hereby declared to possess equal civil and political rights and public privileges". (Mumford's Code of Virginia, 1873, p. 70)

E. That the Constitution and laws of Virginia, so designed and administered, operate to exclude systematically from grand and petit jury service a numerous and widespread class of citizens, otherwise qualified who, because of the disabilities common to the economic status of their class, have been unable to and have not paid poll taxes as required by such Constitution and laws (Tr. 15).

That while negroes and sharecroppers are not, as such, barred from service and grand and petit jurors, they, because of their similar economic status, constitute a large proportion of the class of persons so barred, and the petitioner himself is of such economic class (Tr. 15).

That such economic class, who are unable to and do not pay poll taxes, and who are thereby barred from service as grand and petit jurors, is so numerous and widespread that, in Pittsylvania County, Virginia, with a population for the year 1940 of approximately 30,000 persons over twenty years of age, only approximately 6,000 were able to pay and did pay their poll taxes, and were therefore eligible in law to vote and in fact to serve as grand and petit jurors (Tr. 16).

F. That, by reason of all the foregoing facts and circumstances, petitioner's commitment and the proceedings upon which it is based are wholly null and void and without authority in law, and in violation of the equal protec-

tion and due process clauses of the 14th Amendment to the Constitution of the United States (Tr. 16, 17).

The basis upon which it is contended this Court has jurisdiction to review the judgment and decree in question.

It is respectfully submitted that, under Title 28, Section 344(b), (Judicial Code, Sec. 237, amended), this Court has jurisdiction of this petition for certiorari, such petition being one to review a final judgment and decree by the Supreme Court of Appeals of Virginia, the highest court of that state in which a decision could be had, which judgment and decree dismissed a petition for habeas corpus in which petitioner specially set up and claimed, under the Constitution of the United States, the right, privilege, and immunity against being deprived by the State of Virginia of his life and liberty without due process of law and against being denied by that State the equal protection of the laws.

Opinions Below.

The opinion of the Supreme Court of Appeals of Virginia dismissing the petition for a writ of habeas corpus is unreported, but is appended to this petition.

The opinion of that Court affirming, upon writ of error, the judgment of the Circuit Court of Appeals of Pittsylvania County, which judgment found petitioner guilty of murder in the first degree and sentenced him to death, is reported *Waller* v. *Commonwealth,* 178 Virginia 294.

The Questions Presented.*

The basic question presented by this petition for certiorari is whether the provisions of the 14th Amendment to the Constitution of the United States against the denial by a state of equal protection of the laws, *are limited to denials solely because of race or color, or extend to denials based upon the economic status of a widespread economic class, to which petitioner belongs,* where, as here, the record shows; that such class, including the petitioner, because of their common economic disabilities, have been unable to pay and have not paid poll taxes; that solely for this reason such class, otherwise qualified, has in fact been systematically barred by the State of Virginia from serving either as grand or petit jurors; and that they were in fact so barred from the grand jury indicting petitioner and from the petit jury before which he was tried and convicted.

The question is also presented whether such systematic barring by the State of Virginia of non-payers of poll taxes from both grand and petit jury service constituted a denial to petitioner of due process of law in contravention of the 14th Amendment.

The Reasons Relied On for Allowance of the Writ.

It is respectfully submitted that, by reason of the following, the Supreme Court of Appeals of the State of Virginia, in dismissing the petition for habeas corpus in

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* No question is presented by this petition for certiorari based on those allegations of the petition for habeas corpus (Tr. 4, 5) with reference to the overruling by the trial court of challenges for cause of certain jurors by reason of the fact that they were shown by examination on *voir dire* to be landlords employing sharecroppers.

that court, has decided Federal questions of substance, not theretofore determined by this Court, and has decided them in a way probably not in accord with the applicable decisions of this Court.

On this record, it stands admitted:

(a) That petitioner is a negro and was, at the time of his indictment and conviction, 23 years old and had been, for several years preceding, a sharecropper; that as such, he is one of a numerous and widespread economic class of citizens of that State who, because of disabilities common to the economic status of their class, are unable to pay, and have not paid the poll taxes required by the Constitution and laws of Virginia as a qualification for voting in that State; that such economic class comprises over 80% of the adult citizens of Pittsylvania County, and that negroes and sharecroppers constitute a large proportion of such economic class.

(b) That, while the Constitution and laws of Virginia, as construed by the Supreme Court of Appeals of that State in *Waller* v. *Commonwealth, supra,* do not make the payment of poll taxes, and thereby the right to vote, a qualification *in law* for either grand or petit jury service, such Constitution and laws are expressly designed to permit them to be administered, and they are administered, so that citizens of that State, otherwise eligible for grand and petit jury service under the Constitution and laws of that State, but who have not paid their poll taxes, are *in fact* systematically barred from both grand and petit jury service, and were in fact so barred from the grand jury indicting petitioner and from the petit jury before which he was tried and convicted.

(1) Petitioner submits that the State of Virginia in systematically barring under such circumstances all non-

payers of poll taxes from either grand or petit jury service directly violates the principles of two recent decisions of this Court.

In *Smith* v. *Texas,* 311 U. S. 128, this Court said, p. 130:

> *"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.* For racial discrimination to result in the exclusion from jury service of otherwise qualified groups, *not only violates our Constitution* and the laws enacted under it *but is at war with our basic concepts of a democratic society and a representative government."*

In *Pierre* v. *Louisiana,* 306 U. S. 354, this Court said, p. 358:

> *"Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races* —otherwise qualified to serve as jurors in a community —*are excluded as such from jury service."*

It is true that in both cases it was the systematic exclusion of negroes from jury service which was held to constitute a denial under the 14th Amendment of equal protection of the laws. It may be contended, moreover, that under the dicta of this Court in *Strauder* v. *West Virginia,* 100 U. S. 303, 310, and in the *Slaughter-House Cases,* 83 U. S. (16 Wall.) 36, 81, the provisions of the 14th Amendment against denial of equal protection of the laws are limited to denials solely because of race or color. However, in both cases this Court expressly refused so to hold (*Strauder* case, p. 310; *Slaughter-House Cases,* p. 72), and there is dicta in both cases which argues against such construction.

Those cases, as well as others in which this Court has considered the application of the equal protection clause of the 14th Amendment to the systematic exclusion, not only of negroes, but of other classes of citizens, from grand and petit juries, will be discussed at further length in the brief filed in support of this petition.

It will suffice to say that petitioner will undertake in such brief to demonstrate that the provisions of the 14th Amendment against denial of equal protection of the laws are not limited to such denial merely on account of race and color, but must of necessity extend to the systematic exclusion from jury service of an entire economic class such as that to which petitioner belongs.

Indeed it would lead to sheer absurdity to hold that the provisions of the 14th Amendment against denial of equal protection of the laws are limited to denials merely because of color or race.

This would mean that any state would be free to bar from jury service all Catholics or all Protestants, *but could not similarly bar Jews;* all Republicans or all Democrats; all members of labor unions; all members of the C.I.O. but not all of the A. F. of L., or *vice versa;* all persons upon WPA relief; all persons with incomes over $10,000 or over any other amount; all persons with incomes less than $10,000 or less than any other amount.*

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* Cf. *Civil Rights Cases,* 109 U. S. 3, 11, 13.
American Sugar Refining Co. v. *Louisiana,* 179 U. S. 89, 92.
Kentucky v. *Powers,* 201 U. S. 1, 32-33, 37.
Ruthenberg v. *U. S.,* 245 U. S. 480, 481, 482.
Mamaux v. *U. S.,* 264 Fed. 816, 818-819.
Juarez v. *State,* 277 S. W. (Texas) 1091, 1094.
These cases are discussed in the brief filed in support of this petition.

Obviously, a construction which even conceivably could lead to such results would be, in the language of this Court in *Smith* v. *Texas, supra*:

> "* * * at war with our basic concepts of a democratic society and a representative government."

Furthermore, it would violate that tradition to which this Court refers in its same decision:

> "* * * the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

Finally, it would require this Court to ignore that it has placed no such limited construction on the due-process clause of the same sentence of the 14th Amendment, but has extended the protection of that clause even to inanimate corporations of no race and of no color.

(2) Assuming that the equal protection clause of the 14th Amendment is not limited to denials merely because of color or race, the allegations of the petition for habeas corpus to the Supreme Court of Appeals of the State of Virginia would seem to come directly within the decision of this Court in *Rogers* v. *State of Alabama,* 192 U. S. 226.

The petition for habeas corpus before the Supreme Court of Appeals alleged in substance, as already set out, that the Constitution and laws of the State of Virginia were expressly designed to permit them to be administered, and they are administered, so as to make the payment of poll taxes, and thereby the right to vote, a qualification in fact though not in law for grand and petit jurors; that this is accomplished by specified provisions of the Constitution and laws vesting wide discretion in those charged with the selection of such jurors; further,

that the provisions of such Constitution and laws making the payment of poll taxes a qualification for voting are themselves invalid under the Act of Congress of January 26, 1870, *supra*, being intended to disenfranchise negroes and others theretofore entitled to vote.

In *Rogers* v. *Alabama, supra*, Rogers, a negro who had been indicted and convicted of murder, had made a motion to quash the indictment because, as stated by this Court, page 229:

> "* * * the jury commissioners appointed to select the grand jury excluded from the list of persons to serve as grand jurors all colored persons, although largely in the majority of the population of the county, and although otherwise qualified to serve as grand jurors, solely on the ground of their race and color *and of their having been defranchised and deprived of all rights as electors in the state of Alabama by the provisions of the new Constitution of Alabama.* * * * To show the reality of the second reason alleged for the exclusion of blacks from the grand-jury list, the motion, as a preliminary, *alleged that the sections of the new Constitution* which were before this Court in *Giles* v. *Harris*, 189 U. S. 475, *were adopted for the purpose, and had the effect of disenfranchising all the blacks on account of their race and color and previous condition of servitude.*"

Rogers' motion to quash was stricken under the provisions of Section 3280 of the Civil Code of Alabama as unnecessarily prolix. Rogers excepted, but his exceptions were overruled by the Supreme Court of Alabama. This Court then said (p. 239) in holding that Rogers had been denied equal protection of the laws:

> "We follow the construction implicitly adopted by the supreme court of Alabama, and assume that this section was applicable to the motion. *We also assume,*

as said by the court, that the qualifications of the grand jurors are not in law dependent upon the qualifications of electors, and that any invalidity of the conditions attached to the suffrage could not of itself affect the validity of the indictment. *But in our opinion that was not the allegation. The allegation was that the conditions said to be invalid worked as a reason and consideration in the minds of the commissioners for excluding blacks from the list.* It may be that the allegation was superfluous and would have been hard to prove but it was not irrelevant, for it stated motives for the exclusion which, however mistaken, if proved, tended to show that the blacks were excluded on account of their race, *as part of a scheme to keep them from having any part in the administration of the government or of the law.''*

Petitioner respectfully submits, therefore, that for all the foregoing reasons, the writ of certiorari to the Supreme Court of Appeals of Virginia should issue as prayed.

JOHN F. FINERTY,
Counsel for Petitioner.

THOMAS H. STONE,
MORRIS SHAPIRO,
MARTIN A. MARTIN,
Of Counsel.

Appendix.

OPINION AND JUDGMENT OF THE SUPREME COURT OF APPEALS OF VIRGINIA DISMISSING PETITION OF ODELL WALLER FOR WRIT OF HABEAS CORPUS.

VIRGINIA:

IN THE SUPREME COURT OF APPEALS HELD AT THE COURT LIBRARY BUILDING IN THE CITY OF RICHMOND ON THURSDAY the 22nd day of January, 1942.

This day came Odell Waller, by counsel, and presented to the court his petition that a writ of habeas corpus issue directed to Rice M. Youell, Superintendent of the State Penitentiary, and whomever may hold said petitioner in custody, commanding him and them to have the body of petitioner before this court for the purpose of inquiring into the cause of the commitment and detention of said petitioner, with which petition were filed certain exhibits, to-wit: the record of the trial and conviction of petitioner in the Circuit Court of Pittsylvania county, the judgment in which was affirmed by this court on the 13th day of October, 1941; copy of order of the Circuit Court of Pittsylvania county, dated the 11th day of November, 1941, resentencing the petitioner; affidavit of petitioner dated the 3rd day of December, 1941; and affidavit of Martin A. Martin, dated the 3rd day of December, 1941; and the court having maturely considered the said petition and exhibits therewith, is of the opinion that the said writ of habeas corpus should not issue as prayed. It is therefore considered that the said petition be dismissed.

A copy, Teste:

(Signed) M. B. WATTS, Clerk

No. 1097

Supreme Court of the United States

OCTOBER TERM 1941

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, Superintendent of the State Penitentiary, Richmond,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

JOHN F. FINERTY,
Counsel for Petitioner.

THOMAS H. STONE,
MORRIS SHAPIRO,
MARTIN A. MARTIN,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1941

ODELL WALLER,

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RICE M. YOUELL, Superintendent of the State Penitentiary, Richmond,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

Opinions Below

The opinion of the Supreme Court of Appeals of Virginia, dismissing the petition for a writ of habeas corpus, is unreported, but is appended to the petition for certiorari.

The opinion of that Court, affirming upon writ of error the judgment of the Circuit Court of Appeals of Virginia, which judgment found petitioner guilty of murder in the first degree and sentenced him to death, is reported in *Waller* v. *Commonwealth,* 178 Va. 294.

Grounds Upon Which the Jurisdiction of This Court is Invoked

It is respectfully submitted that under Title 28, Sec. 344(b), (Judicial Code, Sec. 237 amended) this Court has jurisdiction of this petition for certiorari, such petition being one to review a final judgment and decree of the Supreme Court of Virginia, the highest court of that State in which a decision could be had, which judgment and decree dismissed a petition for habeas corpus in which petitioner especially set up and claimed, under the Constitution of the United States, the right, privilege, and immunity against being deprived by the State of Virginia of his life and liberty without due process of law, and against being denied by that State the equal protection of the laws.

Statement of the Case

A concise statement of the case, containing all that is material to the consideration of the questions presented, with appropriate page references to the certified transcript of record from the Supreme Court of Appeals of Virginia, is contained under the heading "SUMMARY OF MATTERS INVOLVED", pp. 1-9 of the petition for writ of certiorari, in support of which this brief is filed. In the interest of brevity, this Court is respectfully referred to such statement of the case in the petition for certiorari.

Specifications of Assigned Errors Intended to be Urged

Petitioner will urge as assigned errors:

1. That the Supreme Court of Appeals of Virginia erred in failing to hold that the State of Virginia had denied petitioner equal protection of the laws and due process of law within the meaning of the 14th Amend-

ment to the Constitution of the United States, by reason of the systematic exclusion by said State of non-payers of poll taxes from grand and petit juries of Pittsylvania County, Virginia, and by reason of such exclusion from the grand jury indicting petitioner and from the petit jury convicting him.

2. That said Court, therefore, erred in dismissing the petition for habeas corpus, and in refusing to issue said writ of habeas corpus as prayed.

Summary of Argument

I. Numerous opinions of this Court make it clear that the prohibitions of the 14th Amendment against denial by a State of equal protection of the laws are not limited to denials on account of race or color, but extend to denials by reason of economic status, politics, or religion, or other general class discriminations.

II. While the Constitution and laws of the State of Virginia, as construed by the Supreme Court of Appeals of Virginia, in *Waller* v. *Commonwealth, supra,* do not expressly make the payment of poll taxes, nor thereby the right to vote, a qualification *in law* for either grand or petit jurors, such Constitution and laws have been expressly designed to permit them to be administered, and they are administered, so as to make the payment of poll taxes a qualification *in fact* for jury service, and thereby systematically to exclude from jury service non-payers of poll taxes, otherwise eligible for such service.

III. On this record no valid contention can be made that certiorari should not issue because of any formal defects in petitioner's respective motions upon trial before the Circuit Court of Pittsylvania County, Virginia, to quash the indictment and to quash the *venire facias,* or because petitioner offered no evidence in support of those motions.

ARGUMENT

I.

Numerous opinions of this Court make it clear that the prohibitions of the 14th Amendment against denial by any State of equal protection of the laws are not limited to denials on account of race or color, but extend to denials by reason of economic status, politics, or religion, or other general class discriminations.

Reference has already been made in the petition for certiorari, p. 12 *et seq.*, to the fact it may be contended that a denial of equal protection of the laws, to come within the prohibitions of the 14th Amendment, must be a denial because of race or color, and that the basis for any such contention is to be found in certain dicta of this Court in *Strauder* v. *West Virginia*, 100 U. S. 303, 310, and in the *Slaughter-House Cases*, 83 U. S. (16 Wall) 36, 81.

It has there likewise been noted that in both cases this Court expressly refused to hold that denials of equal protection of the laws prohibited by the 14th Amendment are so limited, and that, indeed, in both cases there is dicta to the contrary.

In the *Strauder* case, *supra*, this Court said, page 310:

> "We do not say that, within the limits from which it is not excluded by the Amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment

was ever intended to prohibit this. Looking at its history, it is clear that it had no such purpose. *Its aim was against discrimination because of race or color.*"

* * * * *

"*We are not now called upon to affirm or deny that it had other purposes.*"

In so stating, this Court referred to its previous decision in the *Slaughter-House Cases, supra,* where this Court had said, p. 81, with particular reference to the 14th Amendment:

"We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

This Court, however, neglected to quote its immediately succeeding language in the *Slaughter-House Cases,* where it had said, on the same page:

"But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, *or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before* us * * *".

It also is to be noted that this Court, in the *Strauder* case, omitted all reference to the following language which this Court had also used in the *Slaughter-House Cases,* p. 72, and which this Court later quoted in its opinion in *U. S.* v. *Wong Kim Ark,* 169 U. S. 649, 677:

> "*We do not say that no one else but the negro can share in this protection.* Both the language and spirit of these articles are to have their fair and just weight in any question of construction * * * And so if other rights are assailed by the states, which properly and necessarily fall within the protection of these articles, *that protection will apply though the party interested may not be of African descent.*"

Moreover, this Court, in the *Strauder* case, in addition to refusing to hold specifically that the prohibitions of the 14th Amendment against denial of equal protection of the laws are limited to denials on account of race and color, used language in that very decision arguing against such limited construction. At pp. 308-309 of the *Strauder* case, this Court said:

> "The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. *The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.* Blackstone, in his Commentaries, says: 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter'. It is also guarded by statutory enactments intended to make impossible, what Mr. Bentham called 'packing juries'. *It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy*".

Furthermore this Court said, p. 310, of that same opinion:

> "The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and *those are as comprehensive as possible.* Its language is prohibitory; but every prohibition implies the existence of rights and immunities, *prominent among which is the immunity from inequality of legal protection, either for life, liberty or property*".

It is certainly justifiable to conclude, therefore, that even the dicta of this Court in the ***Slaughter-House Cases*** and the *Strauder* case, taken as a whole, do not commit this Court to a construction of the 14th Amendment limiting the prohibitions of the equal protection clause to denials solely because of race and color. On the contrary, it has been seen that, in both decisions, the Court expressly protected itself from any such commitment.

Furthermore, this Court, in numerous opinions, has consistently recognized that the prohibitions of the 14th Amendment against denial by a state of equal protection of the laws cannot be limited to denials solely because of race or color.

In the *Civil Rights Cases,* 109 U. S. 3, this Court said, p. 11:

> "The 1st section of the 14th Amendment, which is the one relied on, after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of

> the laws'. It is state action of a particular character that is prohibited. Individual invasion of the individual rights is not the subject matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs *the* privileges and immunities *of citizens of the United States,* or which injures *them* in life, liberty or property without due process of law, or which denies *to any of them* the equal protection of the laws".

This Court further said, p. 13:

> "It is absurd to affirm that, because the rights of life, liberty and property, *which include all civil rights that men have,* are, by the Amendment, sought to be protected against invasion on the part of the State without due process of law, Congress may, therefore, provide due process of law for their vindication in every case; and that, *because the denial by a State to any persons, of the equal protection of the laws is prohibited by the Amendment,* therefore Congress may establish laws for their equal protection."

Certainly, in the language thus used by this Court in the *Civil Rights Cases,* there is no suggestion that the constitutional protection afforded by the 14th Amendment, either under the due process clause or the equal protection clause, is limited to protection on account of race or color, nor were the provisions of Sections 1 and 2 of the Civil Rights Act of March 1, 1875, there specifically under consideration, themselves so limited, though obviously primarily intended for the protection of negroes.

But it is not necessary to rely on these somewhat general expressions of the opinion of this Court in this respect. This Court has in several instances expressed its direct opinion that the prohibitions of the equal protection clause extend to denials of equal protection of the laws, based not

only on race or color, but on politics, nativity, religion, or other class discriminations "having no possible connection with the duties of citizens".

In *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, p. 92, this Court said, in construing the equal protection clause of the 14th Amendment, in its application to taxation:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. *Of course, if such discrimination were* purely arbitrary, oppressive, or capricious, and *made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other consideration having no possible connection with the duties of citizens* as taxpayers, such exemption would be pure favoritism, *and a denial of the equal protection of the laws to the less favored classes*".*

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* This language of this Court was quoted and applied by the Supreme Court of Texas in holding that the systematic exclusion of Catholics from a jury convicting a Catholic of the illegal sale of liquor was a denial of equal protection of the laws under the 14th Amendment, *Juarez* v. *State*, 277 S. W. (Texas) 1091, 1094.

The decision of this Court in *Ruthenberg* v. *U. S.*, 245 U. S. 480, 481, 482, is in no way inconsistent with the expressions above quoted from its opinion in the *American Sugar Refining* case, *supra*. In the *Ruthenberg* case, so far as appears from the opinion of this Court, there was no contention or evidence of systematic exclusion of Socialists from grand and petit juries in the Northern District of Ohio. The only contention was that the indictment and conviction were unconstitutional because there were no Socialists on either the particular grand jury or the particular petit jury there involved. In denying this contention this Court merely cited its decisions in *Martin* v. *Texas*, 200 U. S. 316, 320, 321, and *Thomas* v. *Texas*, 212 U. S. 278, 282, in which this Court had held that where state laws did not exclude negroes from jury service there must be proof of exclusion in fact.

In *Kentucky* v. *Powers*, 201 U. S. 1, this Court, referring to cases construing the Federal Removal Statute, U. S. Rev. Stat., Sec. 641, said, pp. 32-33:

> "The cases to which we have adverted had reference, it is true, to alleged discrimination against negroes because of their race. *But the rules announced in them equally apply where the accused is of the white race.* Section 641, *as well as the 14th Amendment of the Constitution, is for the benefit of all of every race whose cases are embraced by its provisions, and not alone for the benefit of the African race.*"

Moreover, this Court specifically used this language in referring to the opinion of Judge BARKER, of the Court of Appeals of Kentucky, where, as quoted by this Court, p. 33, Judge BARKER had said:

> "*It is clear that the trial judge was of opinion that it was not an offense against the 14th Amendment or a denial of the equal protection of the laws to the defendant to exclude Republicans* (the accused being a Republican in politics) from the jury, solely because they were Republicans, provided the selected Democrats (the deceased Goebel being a Democrat in politics) were possessed of the statutory qualifications required for jury service".

It is true that this Court held that the Removal Statute did not apply in the *Powers* case even though it was contended that the Court of Appeals of Kentucky, under the laws of that State, could not review the action of the trial court in refusing to quash the indictment and the petit jury panel, though based on such Federal grounds. This Court, however, held that, if such were the case, this Court, on writ of error, could directly review such refusal of the trial court, and could protect the Federal right, which this Court

there implicitly recognizes, against the exclusion of jurors because of the same political party as the accused. This Court said, p. 37:

> "Under this holding, the accused is not deprived of opportunity to have his rights, of whatever nature, which are secured or guaranteed to him by the Constitution or laws of the United States, fully protected by a Federal court. But, it is said that the action of the trial court in refusing to quash the indictment or the panel of petit jurors, *although the motion to quash was based on Federal grounds,* cannot, under the laws of Kentucky, be reviewed by the court of appeals, the highest court of that commonwealth. If such be the law of Kentucky, as declared by the statutes and by the court of appeals of that commonwealth, *then, after the case is disposed of in that court by final judgment,* in respect of the matters of which, under the local law, it may take cognizance, a writ of error can run from this court *to the trial court* as the highest court of Kentucky *in which a decision of the Federal question could be had;* and this court in that event, upon writ of error, reviewing the final judgment of the trial court, can exercise such jurisdiction in the case as may be necessary to vindicate any right, privilege, or immunity specially set up or claimed under the Constitution and laws of the United States, and in respect of which the decision of the trial court is made final by the local law; that is, it may ex-examine the final judgment of the trial court so far as it involved and denied *the Federal right, privilege, or immunity asserted".*

In this connection, it is interesting to note the decision of the Circuit Court of Appeals for the Sixth Circuit in *Mamaux* v. *United States,* 264 Fed. 816, dealing with the alleged exclusion *of the laboring class* from the grand jury indicting, and from the petit jury convicting the plaintiff

in error in that case. There, the Court of Appeals said, pp. 818-819:

> "As to both the grand and petit juries: For the purposes of this review we shall treat the motion to quash as unequivocally asserting *that members of the wage-earning laboring class were purposely excluded from service on the grand jury which indicted defendant, and from the petit jury which convicted him, and because they were of that class,* notwithstanding the possible ambiguity in the statement that 'members of that class have been purposely excluded from said jury service' etc., as well as the grave and unusual nature of the allegation made and the legal requirement that the defense offered must be pleaded with strict exactness. Agnew v. U. S., 165 U. S. 36, 44. *So treating the allegations, and conceding, for the purposes at least of this opinion, that the purposeful exclusion from either jury of members of the wage-earning laboring class (otherwise legally qualified) merely because they belong to that class, constitutes unlawful discrimination of the same character as if on account of race or color,* and further conceding that the motion to quash was seasonably made, (Carter v. Texas, 177 U. S. 442, 447; Crowley v. United States, 194 U. S. 461, 474) we find, upon the record before us, no error in denying the motion. The mere fact, if it were such, that there were no wage-earners on the jury, would not be enough to entitle plaintiff in error to complain. *It must at least appear that wage-earners were purposely excluded because they were of that class.* Martin v. Texas, 200 U. S. 316, 318; Thomas v. Texas, 212 U. S. 278, 283. As by the law of Ohio persons of the wage-earning class are not excluded from jury service, the question whether there was such purposeful exclusion and discrimination became, on the filing of the motion, one of fact. Martin v. Texas, supra, 200 U. S. at pages 318-320)."

That the prohibitions of the 14th Amendment against denial of equal protection of the laws are not limited to denials because of race or color, but extend as well to denials based on politics, nativity, religion, economic status or any other class discrimination, is moreover, as pointed out in the petition for certiorari, consistent with the latest expressions by this Court as to the scope of those provisions of the 14th Amendment.

In *Smith* v. *Texas*, 311 U. S. 128, this Court said, p. 130:

> "*It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.* For racial discrimination to result in the exclusion from jury service of otherwise qualified groups *not only violates our Constitution* and the laws enacted under it *but is at war with our basic concepts of a democratic society and a representative government.*"

In *Pierre* v. *Louisiana*, 306 U. S. 354, this Court said, p. 358:

> "*Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races* —otherwise qualified to serve as jurors in a community—*are excluded as such from jury service.*"

There have been numerous decisions of state courts involving the question of the exclusion of women from juries. Only two of these decisions appear to have reached this Court. In both, the state courts had sustained the exclusion of women, and in both, this Court denied certiorari, without opinion. *Welosky* v. *Commonwealth*, 284 U. S. 684; *Dreher* v. *State of Louisiana*, 278 U. S. 641.

It would be impracticable within the proper limits of this brief in support of a petition for certiorari to discuss

adequately the decisions of the state courts which this Court refused to review. It must suffice to say that, in any event, the denial of certiorari cannot be taken as an affirmance of those decisions, and that it is more than doubtful whether, were the questions there involved directly presented to this Court, it would reach the same conclusions as did the state courts in those cases.

It is respectfully submitted, therefore, that, so far as this Court has heretofore considered the question at all, its opinions clearly support the view that the prohibitions of the 14th Amendment against denial by any state of equal protection of the laws are not limited to denials based on race or color, but extend to denials, as here, based on economic status.

II.

While the Constitution and laws of the State of Virginia, as construed by the Supreme Court of Appeals of Virginia, in *Waller* v. *Commonwealth, supra,* do not expressly make the payment of poll taxes, nor thereby the right to vote, *a qualification in law* for either grand or petit jurors, such Constitution and laws have been expressly designed to permit them to be administered, and they are administered, so as to make the payment of poll taxes *a qualification in fact* for jury service, and thereby systematically to exclude from jury service non-payers of poll taxes, otherwise eligible for such service.*

The Supreme Court of Appeals of Virginia, in *Waller* v. *Commonwealth, supra,* in affirming on writ of error peti-

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* The text of all provisions of the Constitution and Codes of Virginia, herein referred to but not quoted, will be found in the Appendix at the pages designated herein thus; (App. ....).

tioner's conviction, held that the Constitution and laws of Virginia do not make payment of poll taxes, nor thereby the right to vote, *a qualification in law* for either grand or petit jury service.

Both this Court and the petitioner are, of course, bound by the construction put by the Supreme Court of Appeals on the Constitution and laws of its state. Accepting that construction, petitioner will here undertake to show that such Constitution and laws have nevertheless been expressly designed to permit them to be administered, and they are administered, so as to make payment of poll taxes *a qualification in fact* for both grand and petit jury service in that state, and so as systematically to bar from grand and petit juries all non-payers of poll taxes.

Prior to the adoption of the Constitution of the State of Virginia of 1902 and the Code of 1904, the right to vote was expressly made a qualification for grand and petit juries. Article 3, Section 3, of the Constitution of Virginia, in effect prior to 1902, provided:

> "Sec. 3. All persons *entitled to vote* and hold office *and no others* shall be entitled to sit as jurors." (Mumford's Virginia Code, 1873, p. 71.)

The Virginia Code (1873), p. 1058, Ch. 158, Sec. 1, provided:

> "1. All male citizens 21 years of age, and not over 60, *who are entitled to vote* and hold office under the Constitution and laws of this state, shall be liable to serve as jurors, as hereinafter provided."

The Virginia Code (1887), p. 750, Ch. 152, Sec. 139 contained a similar provision.*

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* Omitted from Appendix in interest of brevity.

Up to the adoption of the Constitution of 1902, neither the Constitution nor the Code of Virginia provided for any poll taxes.

In the Constitutional Convention which adopted the Constitution of 1902, provision for the first time was made for the payment of poll taxes.

That Constitution, by Article II, Sections 18, 19, 20, and 21 (App. iii., iv.) not only provided for the payment of poll taxes, but made their payment an essential qualification for registration and thereby for voting.

The Code of 1904, adopted pursuant to that Constitution, contains similar provisions (Secs. 62, 73, 86b., 86c., 86d., and 86e., App. v-viii.)

Both the Constitution of 1902 and Code of 1904, however, eliminated the specific provisions of the former Constitution and Codes making the right to vote a qualification for either grand or petit jury service.

It has already been shown in the petition for certiorari p. 6, that the Constitutional and Code provisions of Virginia for the payment of poll taxes are in direct conflict with the Act of Congress of January 26, 1870, readmitting the State of Virginia to representation in Congress (App. ii).

It will now be shown that the provisions of the Constitution and Codes of Virginia for the payment of poll taxes, and making such payment a qualification for voting, were not only avowedly adopted for the purpose of disenfranchising negroes, but for the unavowed purpose of barring the vast majority of negroes from grand and petit jury service. It will likewise be shown that the rea-

son the latter purpose was not openly avowed and the reason that the payment of poll taxes, and thereby the right to vote, were not expressly made qualifications for jury service, was, as alleged in the petition for habeas corpus (Tr. pp. 14 and 15), to evade the provisions of the Act of March 1, 1875 (c. 114, sec. 4, 18 Stat. 336, now Title 8, Sec. 44, U. S. C., App. iii.), penalizing exclusion from jury service on account of race or color or previous condition of servitude. The constitutionality of this Act was sustained by this Court in *Ex parte Virginia*, 100 U. S. 313.

At the Constitutional Convention in 1902, Delegate Carter Glass openly avowed the purpose of the Convention to be the disenfranchisement of negroes. He stated:

> "The chief purpose of this Convention is to amend the suffrage clause of the existing Constitution. It does not require much prescience to foretell that the alterations which we shall make will not apply to 'all persons and classes without distinction'. We were sent here to make distinctions." (Proc. Const. Conv. p. 14)
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> "I declared then (referring to the beginning of the convention and the debate on the oath) that no body of Virginia gentlemen could frame a constitution so obnoxious to my sense of right and morality that I would be willing to submit its fate to 146,000 ignorant negro voters (great applause) *whose capacity for self-government we have been challenging for thirty years past.*" (Idem. p. 3257)

Pursuant to this avowed purpose, not only did the Convention enact a poll tax as a condition of the right to vote, but pursuant thereto, as well as to the unavowed purpose of making the payment of a poll tax, and therefore the

right to vote, a qualification for grand and petit jury service, the Convention at the same time deleted Section 20 of the Bill of Rights of the then existing Constitution of Virginia. That section provided:

> "20. That all citizens of the state are hereby declared to possess equal civil and political rights and public privileges." (Mumford's Code of Virginia, 1873, p. 70)

In order, however, to evade the penal provisions of the Act of March 1, 1875, *supra,* the Convention also eliminated the provisions of the former Constitution, making the right to vote an express qualification for grand and petit jury service, and such provisions were likewise eliminated from the Code of 1904.

To achieve, nevertheless, the same practical result as would have followed the retention of the express language of the prior Constitution and Codes making the right to vote a qualification for grand and petit jury service, and at the same time to evade the penalties of the Federal statute, the Constitution of 1902 and the Code of 1904 adopted three patent devices. These have been retained in that Constitution, as now amended, and in the existing Code. These devices are:

First: Instead of expressly providing, as had the previous Constitution and Codes, already quoted, that

> "All persons entitled to vote * * * and no others shall be entitled to sit as jurors."

the new Constitution and Code, in providing the qualifications of jurors, in addition to certain specific qualifications as to age and residence, substituted for the former specific words "entitled to vote", broad and vague terms such as,

"competent in other respects"[1], "qualified in all respects"[2], "suitable in all respects"[3], "well qualified to serve as jurors"[4], or "in other respects a qualified person"[5].

Second: The new Constitution and Code, by failing to define the meaning of these broad and vague terms, thereby vested in the judges of the designated courts unlimited discretion as to their interpretation and application in the qualification, or more precisely, in the disqualification, of persons for grand and petit jury service. (See Code 1904, Secs. 3139, 3142, 3143, 3144, 3976, 3977, 4018; App. viii-xi.) The present Code continues to confer this unlimited discretion on judges in the selection of grand jurors, but transfers to jury commissioners the same unlimited discretion in the selection of petit jurors. (See Code 1936, Secs. 4852, 4853, 4895, 5984, 5988, 5989, 5990; App. xiii-xvi.)

Third: Most significant, however, is the fact that Section 86 (b), of the Code of 1904, (App. v.) and Section 109 of the present Code (1936), (App. xi.) requires the Treasurer to file such poll tax lists in the custody of the clerks of the circuit courts of the several counties. That section provides:

> "That the treasurer of each county shall (at stated intervals) * * * file with the clerk of the circuit court

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[1] Sec. 3139 Pollards Virginia Code 1904. (App. viii.)
Sec. 5984 Virginia Code 1936. (App. xv.)

[2] Sec. 4018 Pollards Virginia Code 1904. (App. x.)
Sec. 4895 Virginia Code 1936. (App. xiv.)

[3] Sec. 3976 Pollards Virginia Code 1904. (App. ix.)
Sec. 4852 Virginia Code 1936. (App. xiii.)

[4] Sec. 3142 Pollards Virginia Code 1904. (App. viii.)
Sec. 5988 Virginia Code 1936. (App. xv.)

[5] Sec. 3977 Pollards Virginia Code 1904. (App. x.)
Sec. 4853 Virginia Code 1936. (App. xiv.)

> of his county, or the corporation counsel of his city, a list of all persons who have paid the poll taxes required by the constitution of this state during three years next preceding that in which such election is to be held, *which list shall state the white and colored persons separately,* * * *." (Italics supplied)

It may be urged, however,

First: That the use of general terms such as "competent in other respects", "qualified in all respects", etc. is not uncommon in the statutes of various states.

Second: That at least one purpose for requiring the Treasurer to deposit the poll tax lists in the custody of the clerks of the circuit courts is to make them available for correction in the judicial proceedings provided for by Section 110 of the Virginia Code of 1936 (App. xii.)

As to the second contention, it would seem obvious that if necessity for judicial correction should arise, there would be no difficulty whatever in requiring the treasurer to furnish such lists direct to the court. For all purposes, the custody of the treasurer would seem to be the most appropriate and convenient, whether the lists be considered as relating purely to revenue taxes, or as lists to be furnished to the judges of election as provided in Section 111 (App. xii.)

As to both arguments, however, it can only be said that the best evidence of the purpose of these statutory provisions is the practical application which has been made of them, and that practical application is not open to question on this record.

The allegations of the petition for habeas corpus as to the manner in which these provisions of the laws of Virginia have been administered are supported by an affidavit

based on an examination of the records of the clerk of the Circuit Court of Pittsylvania County.

The petition and the supporting affidavit show:

As to petit juries:

That all persons on the petit jury before whom defendant was tried and all persons on the *venire facias* from which said petit jury was drawn, and all persons on the jury list from which said *venire facias* was summoned, were persons appearing on the poll tax list of Pittsylvania County and no others (Tr. 7, 8, 22, 23). That such poll tax lists are the exclusive source from which the jury commissioners habitually draw the names appearing on the jury list (Tr. 8, 23), and that the jury lists of Pittsylvania County are habitually so compiled, and thereby nonpayers of poll taxes are regularly and systematically excluded from juries in that county (Tr. 8, 23). Furthermore, that in Pittsylvania County, with a population for the year 1940 of approximately 30,000 persons over 20 years of age, only approximately 6,000 were able to pay, and did pay, poll taxes and were thereby eligible in law to vote, and in fact to serve as grand and petit jurors (Tr. 16, 23). That while negroes and share-croppers are not as such barred as grand and petit jurors, they, because of their similar economic status, constitute a large proportion of the economic class so barred, and that petitioner himself is of such economic class (Tr. 15).

As to the grand jury:

That of the seven persons serving on the special grand jury by which petitioner was indicted, all had paid poll taxes, and all except one had paid such poll taxes for the years 1939 through 1940. Such one, though apparently in default for those years, had paid poll taxes for the year 1937 (Tr. 7, 22).

That as to both juries:

That for the purpose of obtaining like information as to jury lists of Pittsylvania County for the year 1939, counsel for petitioner attempted to examine the lists for that year, which petitioner is informed and believes are in the custody of the clerk of the Circuit Court of Pittsylvania County; that the clerk of the court, however, refused counsel access to such lists, stating that he so refused by direction of the judge of said Circuit Court, being the same judge before whom petitioner was convicted (Tr. 8).

In the light of these sworn allegations of the petition for habeas corpus, the truth of which the State of Virginia has had ample opportunity to challenge, but which it has not challenged, there can be no reasonable doubt that the Constitution and laws of Virginia which are so administered, are intended to be so administered, and intended to make the payment of poll taxes *a qualification in fact*, though not in law, for both grand and petit jury service. Under these circumstances, it is respectfully submitted that petitioner's case comes substantially within the principles underlying the decision of this Court in *Rogers* v. *Alabama*, 192 U. S. 229.

III.

On this record no valid contention can be made that certiorari should not issue because of any formal defects in petitioner's respective motions upon trial before the Circuit Court of Pittsylvania County, Virginia, to quash the indictment and to quash the *venire facias*, or because petitioner offered no evidence in support of those motions.

It may be contended that petitioner's separate motions upon trial to quash his indictment and to quash the *venire facias* were insufficient in merely alleging that the members of the special Grand Jury indicting him, and of the *venire fascias* from which was drawn the petit jury trying him, were

> "* * * selected from poll tax payers of Pittsylvania County",*

since it may be claimed that such motions thereby merely alleged *inclusion* of poll tax payers and not *exclusion* of non-poll tax payers.

It should suffice to say that in the opinion of the Supreme Court of Appeals of Virginia, upon writ of error, that Court specifically construed the motion to quash the indictment as based on the *exclusion* of non-poll tax payers. In that opinion, *Waller* v. *Commonwealth, supra,* the Court said:

> "Upon the calling of the case for trial, counsel for accused filed a motion to quash the indictment, on the

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* It should be noted that in the motions actually made the word "exclusively" preceded the word "selected", but that in the bills of exceptions as signed by the trial court the word "exclusively" was omitted. (Tr. pp. 18-19, Exhibit 1, p. 59 and pp. 31, 32).

ground that the indictment was returned by a grand jury *from which non-poll tax payers had been excluded.*"

It will also be noted that while in the succeeding paragraph of that Court's opinion it quoted petitioner's motion to quash the *venire facias* in the terms in which it had literally been made, which were identical with the literal terms of the motion to quash the indictment, that Court made no distinction in this respect in the construction of the two motions, plainly treating both motions as based on the *exclusion* of non-poll tax payers.

It, moreover, should be noted that no other construction of those motions could fairly be made in view of the interpretation put on them by the trial court and by petitioner's counsel at the time they were made. Reference in this respect is made to page 60 of Exhibit 1 attached to the petition for habeas corpus to the Supreme Court of Appeals of Virginia (Tr. 18-19). There it appears Mr. Stone, counsel for petitioner, stated:

"Mr. Stone: As Your Honor knows, there is no requirement that the accused have persons of the same economic or social category on either the grand or petit jury, but there is, in our opinion, a requirement that there be *no exclusion* of persons of the same general social status, and that is our contention.

The Court: Mr. Stone, what is the basis of your motion in this case? What has the qualification or otherwise to do with this defendant?

Mr. Stone: Persons who are unable to pay their poll tax are *excluded* and the accused is in the same general social and economic category.

The Court: I selected the (special grand) jury myself. I don't know whether they are qualified or not; I am always glad to see a person pay his poll tax. I think people ought to qualify and take an interest in

their government, but I don't know whether they are qualified. Motion overruled.

Mr. Stone: May I note an exception?

The Court: Any other motions?

Mr. Stone: That's all. Your Honor overruled the motion also to quash the petit jury?

The Court: What was that?

Mr. Stone: Our motion to quash the *venire facias* for *the same reason.*

The Court: Yes, I overruled that, certainly.

Mr. Stone: We also except to that, your Honor.

It may be contended, however, that the admitted failure of petitioner to offer any evidence of such exclusion in support of his respective motions to quash his indictment and the *venire facias* is a bar to the issuance by this Court of certiorari to review the judgment of the Supreme Court of Appeals of Virginia, dismissing the petition for a writ of habeas corpus. Such a contention could only be based on fundamental misconstruction, as applied to this record, of those decisions of this Court which hold that before application may be made to a federal court for a writ of habeas corpus, state remedies must have been exhausted and state procedure must have been shown inadequate.

Without conceding the validity of those decisions, it will suffice to say here that they have no application to this record. As noted at page 2 of the petition for certiorari, the Supreme Court of Appeals of Virginia dismissed the petition for habeas corpus without requiring any return or answer by the respondent, its opinion merely stating that:

> "* * * the Court having maturely considered said petition and exhibits therewith, is of opinion that said writ of habeas corpus should not issue as prayed. It

> is therefore considered that said petition be dismissed."

In other words, that Court, with full opportunity to do so, did not purport to dismiss the petition for habeas corpus because of petitioner's failure to offer evidence of the fact of exclusion of non-poll tax payers in support of his respective motions, although the petition for habeas corpus itself expressly alleged (Tr. pp. 3 and 4) that petitioner offered no evidence in support of either motion.

This is the more significant because, upon petitioner's preceding writ of error to the Supreme Court of Appeals, that Court, upon the express ground that no evidence had been offered in support of such motions, as well as on the ground that non-payers of poll taxes were not in law excluded from either grand or petit jury service, affirmed the Circuit Court of Pittsylvania County in overruling those motions, *Waller* v. *Commonwealth, supra.*

Moreover, it is obvious that this was no mere inadvertence, but was the result of the recognition by the Supreme Court of Appeals that the grounds upon which it had dismissed petitioner's preceding writ or error could not warrant the dismissal of the petition for habeas corpus. Upon writ of error that court obviously was limited to the record made below. Upon habeas corpus, on the other hand, that court not only could, but was required by the repeated decisions of this Court where a federal right is involved, to go behind the record below. In *Johnson* v. *Zerbst*, 304 U. S. 465, the Court said:

> "True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of habeas corpus cannot be used as a writ of error'. These principles, however, must be construed and applied so as to

> preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. *In such a proceeding 'it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court' and the petitioned court has 'power to inquire with regard to the jurisdiction of the inferior court,* either in respect to the subject matter or to the person, *even if such inquiry involves an examination of facts outside of but not inconsistent with the record.'* ''

Moreover, in *Mooney* v. *Holohan,* 294 U. S. 103, this Court said (p. 113):

> "Upon the state courts, equally with the courts of the Union, rests the obligation to regard and enforce every right furnished by the Constitution."

The soundness is obvious of the reasoning behind the holding of this Court in *Johnson* v. *Zerbst, supra,* and in other cases, that on habeas corpus a court must go behind the record in the lower court, if necessary to determine "the very truth and substance". To hold that a court to which application for habeas corpus is made is confined to the record of the court below, and compelled to refuse competent proof upon habeas corpus of facts showing a deprivation of constitutional rights, would defeat the very purpose of that writ.

Furthermore, it is to be noted that all the decisions involving alleged exclusion of negroes from grand and petit juries, in which this Court refused to pass upon the effect of such exclusion because of failure to prove or to offer proof of exclusion in the court below, were cases coming before this Court on *writ of error* and not on habeas corpus. *Smith* v. *Mississippi,* 161 U. S. 592; *Carter* v. *Texas,* 177 U. S. 442; *Tarrance* v. *Florida,* 188 U. S. 519;

Brownfield v. *South Carolina,* 189 U. S. 426; *Martin* v. *Texas,* 200 U. S. 316; *Franklin* v. *South Carolina,* 218 U. S. 161.

In such cases coming before this Court on writ of error this Court, like the Supreme Court of Appeals of Virginia, upon petitioner's writ of error, was limited to the record in the court below. Clearly, as has been shown, no such limitation applied to the Supreme Court of Virginia upon the petition to it for habeas corpus, and it is obvious no such limitation can apply to this Court upon certiorari to review the judgment dismissing that petition.

The petition to this Court for certiorari is a petition to review the judgment of the Supreme Court of Appeals dismissing the petition for habeas corpus, and is not a petition for certiorari to review the judgment of that Court in dismissing petitioner's preceding writ of error. Petitioner concedes that were this a petition for certiorari to review the dismissal of his writ of error, this Court would, of course, be limited to the record before the Supreme Court of Appeals upon such writ of error, on which record appeared no proof that non-payers of poll taxes were in fact excluded by the State of Virginia from grand and petit juries in Pittsylvania County.

The record before the Supreme Court of Appeals upon the petition for the habeas corpus, on the contrary, contains not only offer of proof, showing the systematic exclusion of non-payers of poll taxes from both grand and petit juries of Pittsylvania County, but such offer is supported by affidavits showing detailed evidence of such exclusion, obtained by an examination of the records of the Circuit Court of that County (Tr. pp. 7, 8, 22, 23). It is this record on habeas corpus which this Court is asked to review upon certiorari, and it is most respectfully submitted that, for the purpose of this petition for that writ, the facts alleged

in the petition for habeas corpus must be assumed to be true, since the petition for habeas corpus was dismissed by the Supreme Court of Appeals without requiring return or answer by respondent, and without opinion other than that the petition was insufficient on its face to warrant the writ. Cf. *Whitten* v. *Tomlinson,* 160 U. S. 231.

Indeed, it is submitted that here the reasons for the assumption of the truth of the facts alleged in a sworn petition for habeas corpus, dismissed without return or answer, are far stronger than in the ordinary case. Here, the facts alleged, showing systematic exclusion of non-payers of poll taxes from both grand and petit juries, were, as shown by the affidavits attached to the petition, obtained from an examination of the records of the Circuit Court of Pittsylvania County. If the Supreme Court of Appeals had reason to believe that such allegations of the petition for habeas corpus were not true, or even had reason to doubt their truth, that Court could readily have determined their truth by requiring a return or answer of that petition. Otherwise, as noted at page 4 of the petition for certiorari, it would be necessary to assume that that Court not only permitted, but compelled, the presentation of grave constitutional questions to this Court, upon a case which it had reason to believe might prove moot. Moreover, as there noted, the very nature of the facts alleged was such as to put a particular responsibility on the Supreme Court of Appeals in this respect, since those facts related to the administration of justice in its subordinate courts, a subject peculiarly within its concern and knowledge. Since that Court required no such return or answer, the only reasonable construction of its judgment, dismissing the petition for the writ, is that that Court recognized that the State of Virginia does in fact systematically exclude non-payers of poll taxes from grand and petit jury service in Pittsylvania County, but held,

nevertheless, that such exclusion does not constitute a denial either of equal protection of the laws or due process of law within the meaning of the 14th Amendment. It is this construction by the Supreme Court of Appeals of petitioner's constitutional rights, based on facts, which, for the purpose of this petition for certiorari, there is every reason to assume are true, that this Court is asked to review.

Finally, it is frankly incredible that either the State of Virginia would contend, or that this Court would sustain a contention, that the truth of the facts alleged in the petition cannot be established on habeas corpus, because the evidence of those facts was not offered in support of petitioner's motions to quash the indictment and the *venire facias*. Counsel do not believe that such a contention would be made, or, if made, be sustained, were its necessary implications understood.

Such a contention would mean that the petitioner must be electrocuted, in violation of his constitutional rights, because of the assumed mistake of his trial counsel as to the procedure necessary to establish such violation. Were such mistake clear, the proposition would be no less atrocious, but it is far from clear that, on this record, it should be held there was any mistake, procedural or otherwise, in this respect.

While it is undoubtedly the general rule that evidence of the facts must be offered in support of a motion to quash an indictment or a *venire facias*, based on the alleged systematic exclusion of an accused's racial, economic, religious or political class, the validity of such a rule, as applied to petitioner's case even in the trial court, may well be questioned. Where, as here, it must be assumed that the State itself deliberately, knowingly and systematically excluded all members of petitioner's eco-

nomic class from grand and petit juries of the county in which petitioner was indicted and tried, the State itself is clearly chargeable with knowledge of such exclusion. Therefore, it would not be unreasonable to hold that a challenge asserting such exclusion should place upon the State the burden of disproving the charge, since the facts are peculiarly and readily within its knowledge and, therefore, the charge, if unfounded, may be readily disproved.

However this may be, it would be Alice in Wonderland logic to contend that, upon this petition for certiorari to review the denial of habeas corpus, the petitioner, because he did not prove in the trial court facts, which under the sworn allegations of the petition for habeas corpus it must be assumed the State already knew, petitioner may not prove such facts to this Court, although the State, with full opportunity to do so, has not even challenged them. Indeed, under reasonable principles of procedure, it might well be held that the State should now be barred from any future challenge of such facts. As has been noted already, those facts were of a nature peculiarly within the concern and knowledge of the Supreme Court of Appeals. Had that Court any reasonable doubt of the truth of such facts presented to it under sworn allegations, it was not only it's right but it's duty to require proof of them *before* permitting the grave constitutional questions arising on them to come before this Court. To permit subsequent challenge of them would be to encourage the burdening of this Court with the possibly unnecessary consideration and determination of constitutional questions, and to impose on all parties unnecessarily circuitous procedure.

Waiving aside, however, all such considerations of reasonable and proper procedure, and assuming that petitioner's trial counsel did make a mistake as to the procedure required to establish the facts of exclusion, the truth

of which is not open to question on this record, is the penalty for such a mistake to be petitioner's electrocution, even though the violation of petitioner's constitutional rights is otherwise clear? It is respectfully submitted that the legalistic detachment inherent in contentions of this nature would seldom be possible if those advancing them were compelled to assume the physical task, as well as the moral responsibility, of executing the victims of their legalism. In any event, it is respectfully submitted, there can be no warrant on this record for any such legalistic disregard of petitioner's constitutional rights.

CONCLUSION.

In conclusion, it is respectfully submitted that the Supreme Court of Appeals of Virginia, in dismissing the petition to that Court, for habeas corpus has plainly decided federal questions of wide public interest, not heretofore determined by this Court and, it would appear, has decided them in a way not in accord with the applicable decisions of this Court. It is further respectfully submitted that, unless this Court shall issue its writ of certiorari as prayed, and shall thereupon require the issuance of a writ of habeas corpus to petitioner and his discharge upon such writ, petitioner will be deprived of his life in contravention of his rights under the 14th Amendment to the Constitution of the United States.

Respectfully submitted,

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APPENDIX

Relevant Parts of Constitutional and Statutory Provisions, State and Federal, Cited in Brief and Petition

ACT OF CONGRESS, JANUARY 26, 1870.

(16 Stat. 62)

Whereas the people of Virginia have framed and adopted a constitution of State government, which is republican; and whereas the legislature of Virginia, elected under said constitution, have ratified the fourteenth and fifteenth amendments to the Constitution of the United States; and whereas the performance of these several acts, in good faith, was a condition precedent to the representation of the state in congress:

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that the said State of Virginia is entitled to representation in the Congress of the United States: Provided,

* * * * *

And provided further, that the State of Virginia is admitted to representation in Congress as one of the States of the Union, upon the following fundamental conditions:

First. That the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said state: *Provided,* that any alteration of said Constitution, prospective in its effects, may be made in regard to the time and place of residence of voters.

Second. That it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color or previous condition of servitude, of the right to hold office under the constitution and laws of said State, or upon any such ground to require of him any other qualifications for office than such as are required of other citizens.

TITLE 8, U. S. C., SECTION 44.

"**Sec. 44. Exclusion of jurors on account of race or color.** No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000. Mar. 1, 1875, c. 114, sec. 4, 18 Stat. 336)",

CONSTITUTION OF VIRGINIA OF 1902 AS AMENDED.*

§ 18. **Qualification of voters.**—Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the general assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved until the expiration of thirty days after such removal.

§ 19. **Registration of voters; those registered prior to nineteen hundred and four.**—Persons registered under the general registration of voters during the years nineteen hundred and two and nineteen hundred and three, whose

* Text is that appended to Virginia Code of 1936. There are no substantial changes from text of Constitution of 1902 as originally enacted.

names were required to be certified by the officers of registration for filing, record and preservation in the clerks' offices of the several circuit and corporation courts, shall not be required to register again, unless they shall have ceased to be residents of the State, or became disqualified by section twenty-three.

§ 20. Who may register.—Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided:

First. That he has personally paid to the proper officer all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to register; or, if he come of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him; * * *

§ 21. Conditions for voting.—A person registered under the general registration of voters during the years nineteen hundred and two and nineteen hundred and three, or under the last section, shall have the right to vote for all officers elective by the people, subject to the following conditions:

That unless exempted by section twenty-two, he shall, as a prerequisite to the right to vote, personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote. * * *

POLLARDS VIRGINIA CODE 1904.

Sec. 62. Qualification of voters; disqualifications. Every male citizen of the United States twenty-one years old, who has been a resident of the State two years, of the county, city or town one year, and of the precinct in which he offers to vote thirty days next preceding the election, and who has been duly registered and has paid his State poll tax, as required by law, and is otherwise qualified under the Constitution and laws of this State, shall be entitled to vote for members of the general assembly and all officers elected by the people, and in any special election the local-option election in any county, district, city or town, except when otherwise provided by law; * * *

Sec. 73. Who to be registered. Each registrar shall, after the first day of January, nineteen hundred and four, register every male citizen of the United States, of his election district, who shall apply to be registered at the time and in the manner required by law, who shall be twenty-one years of age at the next election, who has been a resident of the State two years, of the county, city or town one year, and of the precinct in which he offers to register thirty days next preceding the election, who, at least six months prior to the election, had paid to the proper officer all State poll-taxes assessed or assessable against him under this or the former Constitution for three years next preceding that in which he offers to register, or if he come of age at such time that no poll-tax shall be assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents in satisfaction of the first year's poll-tax assessable against him, * * *

* * * * *

Sec. 86b. Lists of all persons who have paid their poll taxes; posting the same; compensation therefor. (1) The treasurer of each county and city shall, at least five months before each regular election, file with the circuit court of his county, or of the corporation court of his city, a list

of all persons in his county or city who have paid not later than six months prior to such election the State poll taxes required by the Constitution of this State during the three years next preceding that in which such election is held, which list shall be arranged alphabetically by magisterial districts or wards, shall state the white and colored persons separately, and shall be verified by the oath of the treasurer. The clerk, within ten days from the receipt of the list, shall make and certify a sufficient number of copies thereof, and shall deliver one copy for each voting place in his county or city to the sheriff of the county or sergeant of the city, whose duty it shall be to post one copy, without delay, at each of the voting places, and, within ten days from the receipt thereof, to make return on oath to the clerk as to the places where and the dates at which said copies were respectively posted; which return the clerk shall record in a book kept in his office for the purpose; and he shall keep in his office for public inspection, for at least sixty days after receiving the list, not less than ten certified copies thereof.

(2) Within thirty days after the list has been so posted any person who shall have paid his capitation tax, but whose name is omitted from the certified list, may, after five days' written notice to the treasurer, apply to the circuit court of his county, or corporation court of his city, or to the judge thereof in vacation, to have the same corrected and his name entered thereon, which application the court or judge shall promptly hear and decide.

(3) The clerk shall deliver, or cause to be delivered, with the poll books, at a reasonable time before every election, to one of the judges of election of each precinct in his county or city, a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the purpose of voting. The clerk shall also, within sixty days after the filing of the list by the treasurer, forward a certified copy thereof, with such corrections as may have been made by order of the court or judge, to the auditor of public accounts, who shall charge the amount of the poll

taxes stated therein to such treasurer, unless previously accounted for.

* * * * *

Sec. 86c. Furnishing by the county treasurers of list of those who are residents of or voters in the incorporated towns who have paid their State capitation taxes six months prior to a regular election to be held in the incorporated towns of which they are residents. The treasurer of every county in this Commonwealth in which any incorporated town is located, in which a regular election is to be held on the second Tuesday in June in any year in pursuance of law, shall furnish the clerk of the circuit court of his county with a list of the residents of said incorporated town who have paid the State capitation tax provided by law six months prior to the time of holding said election. The said lists shall be prepared and posted in all respects as is provided for in section thirty-eight of the Constitution. The said treasurers shall not for the purpose of this act be required to furnish or post list of those voters of his county who have paid their capitation taxes six months prior to the second Tuesday in June unless they are voters in and residents of some incorporated town in which an election is to be held. * * *

Sec. 86d. Evidence of the prepayment of State poll taxes by voters transferred from one city or county to another city or county. In any case where a voter has been transferred from one city or county to another city or county, and has paid his State poll taxes for the three years next preceding that in which he offers to vote, or for any of said years, in any county or city in this State, such voter may exhibit to the judges of election the certificate of the treasurer of the city or county wherein the said taxes were paid, showing such payment, and that the same was made at least six months prior to the election, by the person offering to vote, such certificate shall be conclusive evidence of the facts therein stated for the purpose of voting. The treasurer of any county or city, upon the application of any such voters, shall furnish the certificate herein required. * * *

Sec. 86e. Manner in which a duly registered voter who has not been assessed with his State capitation tax may pay the same, penalties for failure on the part of clerks and treasurers to observe the law. If any duly registered voter in any city or county in this Commonwealth apply to the treasurer of such city or county to pay his State capitation tax, and such treasurer is prevented from receiving such tax because the same has not been assessed against such applicant, such duly registered voter may thereupon apply to the county clerk of his county, or the clerk of the corporation or hustings court of his city, as the case may be, for a certificate that he is a duly registered voter. The clerk shall deliver such certificate to the applicant forthwith and deliver a copy thereof to the commissioner of the revenue, and upon presentation of such certificate to the treasurer of the county or city the treasurer shall accept payment of such State capitation tax from such voter and give a receipt therefor. * * *

Sec. 3139. Who liable to serve as jurors.—"All male citizens over twenty one years of age who shall have been residents of this State two years, and of the county, city, and town in which they reside one year next preceding their being summoned to serve as such, and competent in other respects, except as hereinafter provided, shall remain and be liable to serve as jurors. * * *"

Sec. 3142. Judges of circuit and corporation courts to prepare annual lists of jurors.—The judge of the circuit court of each county and the judge of the circuit court of each city of the first class, and the judge of each city court shall annually, between the first day of January and the first day of July, prepare a list of such inhabitants in each county or corporation where their respective courts are to be held, as are not excluded or exempt by section thirty one hundred and forty, as are well qualified to serve as jurors. Such list shall contain one for every one hundred inhabitants of each magisterial district or ward, having regard to the population of the

county or corporation, but the whole number of persons selected in the county or corporation shall not be less than one hundred nor more than three hundred, except in the courts for the cities of Richmond and Norfolk the number shall not exceed six hundred. (1870-71, P. 50; 1899-00, P. 997; 1902-3-4, P. 603.)

Sec. 3143. Lists to be delivered to clerks, and by them safely kept. The list so prepared shall be delivered to the clerk of the court, to be safely kept by him, subject only to the inspection of the judge, as hereinafter provided; and to such list the judge may, from time to time, add the names of any persons liable to serve, and strike therefrom the names of any who have become disqualified or exempt from such service: provided, that the number on the list shall not at any time exceed three hundred, except in the cities of Richmond and Norfolk, and in said cities shall not exceed six hundred. (1870-71, p. 51; 1902-3-4, p. 603.)

Sec. 3144. Names of jurors to be written on separate ballots; ballots to be folded and deposited with list in a box. When such list is made out, the judge shall cause all the names thereon to be fairly written, each on a separate paper or ballot, and shall so fold or roll up the ballots that they will resemble each other as nearly as may be, and the names written thereon not be visible on the outside, and shall deposit the ballots with the said list in a secure box prepared for that purpose, and the said box shall be locked and safely kept by the clerk of such court and opened only by order of the judge thereof, as hereinafter provided. (1870-71, p. 51; 1899-00, p. 1012; 1902-3-4, p. 603.)

Sec. 3976. When and how grand jurors to be selected by judges of circuit courts of counties and corporation or hustings courts of cities; lists to be delivered to clerk; when and how jurors summoned.—The judges of the said courts shall annually, in the month of June, July, or August, select from the male citizens of each county of their

respective circuits and in their several cities forty eight persons twenty-one years of age and upwards, of honesty, intelligence, and good demeanor, and suitable in all respects to serve as grand jurors, who shall be the grand jurors for the county or city from which they are selected for twelve months thereafter. Such jurors shall be selected in each county from the several magisterial districts of the county and from the several wards of the cities in proportion to the population thereof, and the judge making the selection shall at once furnish a list of those selected to the clerk of his court in each county of his circuit or in his city. The clerk, not more than twenty days before the commencement of each term of his court at which a regular grand jury is required, shall issue a venire facias to the sheriff of his county or sergeant of his city, commanding him to summon twelve of the persons selected as aforesaid to be named in the writ to appear on the first day of the court, to serve as grand jurors. * * *

Sec. 3977. Who are qualified; number of grand jury, regular and special.—A regular grand jury shall consist of not less than nine nor more than twelve persons, and a special grand jury of not less than six nor more than nine persons. Each grand juror shall be a citizen of this state, twenty-one years of age, and shall have been a resident of this state two years, and of the county or corporation in which the court is to be held one year, and in other respects a qualified juror, and not a constable, ordinary keeper, overseer of a road, and not the owner or occupier of a grist-mill, and, when the grand juror is for a circuit court of a county, not an inhabitant of a city. (1877-8, P. 331; 1889-90, P. 91; 1902-3-4, P. 878.)

Sec. 4018. The venire facias in case of felony: what to command; number of persons to be summoned, and how selected.—The writ of venire facias, in case of felony, shall command the officer to whom it is directed to summon sixteen persons of his county or corporation, to be taken from a list furnished him by the clerk issuing the writ, who are

qualified in all respects to serve as jurors, to attend the court wherein the accused is to be tried on the first day of next term thereof, or at such other time as the court or judge may direct. At one term of the court only one jury shall be summoned, unless the court or judge thereof otherwise direct; and the jury so summoned may be used for the trial of all the cases which may be tried at that term, both felonies or misdemeanors.

The list mentioned in this section shall contain the names of twenty persons drawn for that purpose by the clerk of the court or his deputy from the names and box provided for by sections thirty one hundred and forty two and thirty one hundred and forty four of the Code of Virginia. * * *

VIRGINIA CODE OF 1936.

§ 109. **List of all persons who have paid their State poll taxes shall be made by treasurer; duties of clerk in reference thereto; posting thereof by the sheriff or sergeant.**— The treasurer of each county and city shall, at least five months before the second Tuesday in June in each year in which a regular June election is to be held in such county or city, and at least five months before each regular election in November, file with the clerk of the circuit court of his county or the corporation court of his city a list of all persons in his county, or city, who have paid not later than six months prior to each of said dates the State poll taxes required by the Constitution of this State during three years next preceding that in which such election is to be held, which list shall state the white and colored persons separately, and shall be verified by the oath of the treasurer. The clerk within ten days from the receipt of the list, shall make and certify a sufficient number of copies thereof, and shall deliver one copy for each voting place in his county or city to the sheriff of the county or sergeant of the city, whose duty it shall be to post one copy without delay, at each of the voting places and within ten days

from the receipt thereof to make return on oath to the clerk as to the places where and dates at which said copies were respectively posted; which return the clerk shall record in a book kept in his office for the purpose; and he shall keep in his office for public inspection, for at least sixty days after receiving the list, not less than ten certified copies thereof. (1904, p. 131; 1908, p. 162; 1924, p. 57; 1926, p. 525; 1928, pp. 713, 714; 1934, p. 73.)

§ 110. Correction of lists.—Within thirty days after the list has been so posted any person who shall have paid his capitation tax, but whose name is omitted from the certified list, may, after five days' written notice to the treasurer, apply to the circuit court of his county, or corporation court of his city, or to the judge thereof in vacation, to have the same corrected and his name entered thereon, which application the court or judge shall promptly hear and decide. If it be decided that the name was improperly omitted, the judge shall enter an order to that effect and the clerk of the court shall correct the list furnished him by the treasurer accordingly, and deliver a certified copy of such corrected list to the judges of election at the precinct at which such voter is registered. It shall be the duty of the treasurer to revise said list within ten days after it has been posted as aforesaid and to correct any omissions or clerical or typographical errors. (1904, p. 131; 1908, p. 162; 1926, p. 99.)

§ 111. Duty of clerk to deliver lists with poll books, and to forward copies to Auditor.—The clerk shall deliver, or cause to be delivered, with the poll books at a reasonable time before every election, to one of the judges of election of each precinct in his county or city, a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the purpose of voting. The clerk shall also, within sixty days after the filing of the list by the treasurer, forward a certified copy thereof, with such corrections as may have been made by order of the court or judge, to the Auditor of Public Accounts, who shall charge the amount of the poll taxes stated therein to such treas-

urer, unless previously accounted for. (1904, p. 131; 1908, p. 162.)

§ 4852. When and how grand jurors to be selected by judges of circuit courts of counties and corporation or hustings courts of cities; lists to be delivered to clerk; when and how jurors summoned.—The judges of the said courts shall annually, in the month of June, July, or August, select from the male citizens of each county of their respective circuits and in their several cities forty-eight persons twenty-one years of age and upwards, of honesty, intelligence, and good demeanor, and suitable in all respects to serve as grand jurors who shall be the grand jurors for the county or city from which they are selected for twelve months next thereafter. Such jurors shall be selected in each county from the several magisterial districts of the county, and in each city from the several wards of the cities in proportion to the population thereof, and the judge making the selection shall at once furnish to the clerk of his court in each county of his circuit or in his city a list of those selected for that county or city. The clerk, not more than twenty days before the commencement of each terms of his court, at which a regular grand jury is required, shall issue a venire facias to the sheriff of his county, or sergeant of his city, commanding him to summon not less than five nor more than seven of the persons selected as aforesaid (the number to be designated by the judge of the court by an order entered of record) to be named in the writ, to appear on the first day of the court to serve as grand jurors. No such person shall be required to appear more than once until all the others have been summoned once, nor more than twice until the others have been twice summoned, and so on; provided, that no male citizen over sixty years of age shall be compelled to serve as a grand juror. The clerk, in issuing the venire facias, shall apportion the grand jurors, as nearly as may be ratably among the magisterial districts or wards; but the circuit court of James City county, or the judge thereof in vacation, shall select the grand jurors for such court from said county and the city of Williams-

burg in such proportion from each as he may think proper. (Code 1887, § 3976; 1899-90, p. 90; 1902-3-4, pp. 22, 878; 1932, p. 813; 1934, p. 80.)

§4853. Who are qualified; number of grand jurors, regular and special.—A regular grand jury shall consist of not less than five nor more than seven persons, and a special grand jury of not less than five nor more than seven persons. Each grand juror shall be a citizen of this State, twenty-one years of age, and shall have been a resident of this State two years, and of the county or corporation in which the court is to be held one year, and in other respects a qualified juror, and not a constable, or overseer of a road, and, when the grand juror is for a circuit court of a county, not an inhabitant of a city, except in those cases where the circuit court of the county has jurisdiction in the city, in which case the city shall be considered as a magisterial district, or the equivalent of a magisterial district, of the county for the purpose of the jury lists. (Code 1887, § 3977; 1899-90, p. 91; 1902-3-4, p. 878; 1916, p. 764; 1920, p. 597; 1932, p. 814.)

§ 4895. Venire facias in case of felony; what to command; number of persons to be summoned, and how selected; irregularities; venire, when persons jointly indicted for a felony elect to be tried separately.—The writ of venire facias in case of felony shall command the officer to whom it is directed to summon twenty persons of his county or corporation, to be taken from a list furnished him by the clerk issuing the writ, who are qualified in all respects to serve as jurors, to attend the court wherein the accused is to be tried on the first day of the next term thereof, or at such other time as the court or judge may direct. At one term of the court only one jury shall be summoned, unless the court or judge thereof otherwise direct; and the jury so summoned may be used for the trial of all the cases which may be tried at that term, including civil cases as well as felonies and misdemeanors.

The list mentioned in this section shall contain the names of twenty-four persons drawn for that purpose by the clerk

of the court or his deputy from the names and box provided for by sections fifty-nine hundred and eighty-eight and fifty-nine hundred and ninety of this code. * * *

§ 5984. **Who liable to serve as jurors.**—All male citizens over twenty-one years of age who shall have been residents of this State one year, and of the county, city or town in which they reside six months next preceding their being summoned to serve as such, and competent in other respects, except as hereinafter provided, shall remain and be liable to serve as jurors; but no officer, soldier, seaman, or marine of the United States army or navy shall be considered a resident of this State by reason of being stationed herein, nor shall an inmate of any charitable institution be qualified to serve as juror. The following persons shall be disqualified from serving as jurors; First, idiots and lunatics: second, persons convicted of bribery, perjury, embezzlement of public funds, treason, felony, or petit larceny. (Code 1887, § 3139; 1891-2, p. 209; 1895-6, p. 49; 1902-3-4, pp. 10, 288, 602; 1930, p. 624; 1936, p. 379.)

§ 5988. **List of jurors to be prepared by the jury commissioners.**—Such commissioner, shall as soon as may be after their appointment, prepare a list of such of the inhabitants of that county or city as are well qualified to serve as jurors and are not excluded or exempt by sections fifty-nine hundred and eighty-four and fifty-nine hundred and eighty-five of this Code. The whole number of persons selected in the county or city shall not be less than one hundred nor more than three hundred, except that for the city of Richmond and the city of Norfolk the number shall not exceed one thousand and the corporation court for the city of Roanoke, the number shall not exceed six hundred, and for the city of Newport News and the city of Petersburg the number shall not exceed five hundred. The same percentage of population shall be taken from each magisterial district or ward. The inhabitants of a city, however, which is situated in whole or in part within the bounds of a county shall not be placed on the lists for such county; except in those cases where the circuit court

of the county has jurisdiction in the city in which cases the city shall be considered as a magisterial district, or the equivalent of a magisterial district, of the county for the purposes of the jury lists. (Code 1919, § 5988; 1918, p. 505; 1920, pp. 3, 595; 1924, p. 129.)

§ 5989. **Lists to be delivered to clerks, and by them safely kept.**—The list so prepared shall be delivered to the clerk of the court, to be safely kept by him. To such list the commissioners may from time to time, add the names of any persons liable to serve, and strike therefrom the names of any who have become disqualified or exempt from such service, but the number on the list shall not at any time exceed the number prescribed by the preceding section.

§ 5990. **Names of jurors to be written on separate ballots; ballots to be folded and deposited with list in a box.**—When such list is made out, the commissioners shall cause all the names thereon to be fairly written, each on a separate paper or ballot, and shall so fold or roll up the ballots that they will resemble each other as nearly as may be, and the names written thereon not be visible on the outside, and shall deposit the ballots with the said list in a secure box prepared for that purpose, and the said box shall be locked and safely kept by the clerk of such court and opened only by the direction of the judge thereof, as hereinafter provided.

TAX CODE (VIRGINIA CODE, 1904).

Sec. 4. The classification under Schedule A shall be as follows—to wit: first, the number of white male inhabitants who have attained the age of twenty-one years, except those pensioned by this State for military service; second, the number of colored male inhabitants who have attained the age of twenty-one years, except those pensiond by this State for military service.

Sec. 5. Tax of persons. Upon every male person, classified in schedule A, there shall be a tax of $1.50, of which

$1.00 shall be for aid of the public free schools, and fifty cents shall be returned and paid into the treasury of the county or city in which it shall be collected.

TAX CODE (VIRGINIA CODE, 1936).

Sec. 22. Levy of state capitation tax. There is hereby levied a state capitation tax of one dollar and fifty cents per annum on every resident of the State not less than twenty-one years of age, except those pensioned by the State for military services; one dollar of which shall be applied exclusively in aid of the public free schools, in proportion to the school population, and the residue shall be returned and paid by the State into the treasury of the county or city in which it was collected, to be appropriated by the proper county or city authorities to such county or city purposes as they shall respectively determine; but said State capitation tax shall not be a lien upon nor collected by legal process from, the personal property which may be exempt from levy or distress under the poor debtor's law.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1097

ODELL WALLER,
Petitioner,

against

RICE M. YOVELL, Superintendent of the State Penitentiary, Richmond,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

THURGOOD MARSHALL,
Counsel for American Civil Liberties Union.

APPEAL PRINTING CO., INC., 120 CEDAR ST., NEW YORK, WO 2-2942

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

The American Civil Liberties Union is submitting a brief herein as *amicus curiae* because of its interest in the question of class discrimination raised in this case. The American Civil Liberties Union is an organization devoted to the furtherance and protection of the civil rights guaranteed by the Constitution of the United States. It has for many years supported individuals and groups whose basic rights were threatened. It believes that it is essential to the preservation of democracy in this country that no state shall be permitted to discriminate against any of its residents because of their economic status and that the Fourteenth Amendment to the United States

Constitution must be so interpreted. Believing that this case presents an issue of importance in this field, we beg leave to submit the following discussion:

In this case, petitioner, a Negro sharecropper, contends that he has been denied due process and equal protection of the laws because the Constitution and laws of Virginia are so designed and administered as to operate to exclude systematically from grand and petit jury service, and specifically from the grand and petit juries by which petitioner was indicted and convicted, a numerous and widespread class of citizens (to which class petitioner belongs) otherwise qualified who, because of the economic disabilities common to the members of their class, have been unable to and have not paid poll taxes as required by such Constitution and laws.

It is submitted that although the present Constitution and laws of Virginia do not specifically and in terms prescribe the payment of poll taxes as a qualification for grand and petit jury service, said Constitution and laws have not only been administered so as to make payment of poll taxes a qualification *in fact* for grand and petit jurors, but such Constitution and laws have been designed to permit them to be so administered.

This Court, in *Strauder* v. *West Virginia*, 100 U. S. 303, said, at pages 308-309:

> "The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. *The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.* Black-

> stone, in his Commentaries, says: 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.' It is also guarded by statutory enactments intended to make impossible, what Mr. Bentham called 'packing juries'."

In *Smith* v. *Texas,* 311 U. S. 128, this Court said, page 130:

> *"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.* For racial discrimination to result in the exclusion from jury service of otherwise qualified groups *not only violates our Constitution* and the laws enacted under it *but is at war with our basic concepts of a democratic society and a representative government."*

In *Pierre* v. *Louisiana,* 306 U. S. 354, this Court said, page 358:

> *"Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races*—otherwise qualified to serve as jurors in a community—*are excluded as such from jury service."*

Thus, the extensions of the prohibitions of the Fourteenth Amendment against denial of equal protection of the laws, particularly in cases involving the exclusion of groups or classes from jury service, are not limited to denials because of race or color, but extend as well to denials based on politics, nativity, religion, economic status, or any other class discrimination.

In the instant case, the petitioner offered evidence that in Pittsylvania County, Virginia, wherein he was indicted and tried, the population of persons over twenty years of age was approximately 30,000 in 1940, and of this number only about 6,000 had paid poll taxes. Under these circumstances, "chance and accident" alone could hardly have brought about the listing for grand and petit jury service of no non-payers of poll taxes. See *Smith* v. *Texas,* 311 U. S. 128, *infra.* Nor can it be said that a jury from which so numerous and widespread a class of citizens is excluded can be "truly representative" of the community.

Petitioner is a Negro, and as such, a member of that economically, politically and otherwise disadvantaged group which the provisions of the Constitution and codes of Virginia for the payment of poll taxes, and making such payment a qualification for voting, were not only avowedly adopted for the purpose of disfranchising but for the unavowed purpose of barring the vast majority of the class from grand and petit jury service.

That it was the avowed purpose of the Constitutional Convention in Virginia which adopted the Constitution of 1902, to amend the suffrage clause of the then existing Constitution so as to deprive, *inter alia,* Negroes of the right to vote, is obvious from the following statement made in such Convention by Delegate Carter Glass:

> "The chief purpose of this Convention is to amend the suffrage clause of the existing Constitution. It does not require much prescience to foretell that the alterations which we shall make will not apply to 'all persons and classes without distinction'. We were sent here to make distinctions. We expect to make distinctions. We will make distinctions." (Proc. Const. Conv. p. 14)

> "I declared then (referring to the beginning of the convention and the debate on the oath) that no body of Virginia gentlemen could frame a constitution so obnoxious to my sense of right and morality that I would be willing to submit its fate to 146,000 ignorant negro voters (great applause) whose capacity for self-government we have been challenging for thirty years past." (idem. p. 3257)

That it was the unavowed purpose in adopting the provisions of the Constitution and codes of Virginia in prescribing the payment of poll taxes, to bar the vast majority of the class to which petitioner belongs from grand and petit jury service, or at least the present practical application of these provisions effects this end, is obvious from the allegations of fact, made by petitioner herein, to wit:

That, of the seven persons serving on the special grand jury by which petitioner was indicted, all had paid poll taxes, and all except one had paid such taxes for the years 1938 to 1940, both inclusive. Such one, though apparently in default for those years, had paid poll taxes for the year 1937 (Tr. 7, 8).

In *Smith* v. *Texas,* 311 U. S. 128, the Court said:

> "The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. *The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.*
>
> "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. *But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner, as practically to proscribe any group thought by the law's administrators to be undesirable.* And from the record

> before us the conclusion is inescapable that it is the latter application that has prevailed in Harris County. *Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service.*"

This Court has recognized the fact that:

> "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Strauder* v. *West Virginia, supra,* p. 308. See also *Rawlins* v. *Georgia,* 207 U. S. 638, 640.

and that the nature of the community from which this case arises is such as to give reasonable basis for the assumption that prejudice against the class to which petitioner belongs and which because of its inability to pay poll taxes is, *in fact,* excluded from service on grand and petit juries, would exist in the minds of the members of the more fortunate economic class.

We maintain, therefore, that the prohibitions of the Fourteenth Amendment extend to the practice revealed herein whereby members of the economic class to which petitioner belongs are excluded from grand and petit jury service in Pittsylvania County, Virginia.

It is respectfully submitted, therefore, that the writ of certiorari prayed for be granted.

Respectfully submitted,

THURGOOD MARSHALL,
Attorney for American Civil Liberties Union,
Amicus Curiae.

No. 1097

APR 24 1942

In the Supreme Court of The United States

OCTOBER TERM 1941

ODELL WALLER,
Petitioner

vs.

RICE M. YOUELL, Superintendent of the Virginia State Penitentiary,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ABRAM P. STAPLES,
Attorney General of Virginia,
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Assistant Attorney General,
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In the
Supreme Court of The United States

OCTOBER TERM 1941

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

There are aspects of this case apart from the manifest correctness of the judgment below as a matter of law which impel the Attorney General of Virginia to insist that petitioner's contentions should not be held to present a substantial Federal question; that the imaginary racial and economic issues which petitioner seeks to raise should not be magnified or any color of reality

attributed to them by the granting of certiorari from this Court.

It cannot be overlooked that propaganda of internal dissension and the activation of latent prejudices are among the most powerful weapons available to enemies of the United States. They could ask nothing more than for this Court to countenance an attenuated theory of economic and racial persecution in a case where no such issue is actually involved, and to invite agitation of similar inflammatory controversies in hundreds of other cases throughout the nation. These considerations are particularly vital in view of the notoriety given this case through organized publicity of the most vicious and deceptive nature, of which the court has judicial knowledge from newspaper reports describing, among other things, the deluge of telegrams sent to the Governor of Virginia on petitioner's behalf from all parts of the United States, protesting even that petitioner killed in self-defense, or otherwise exhibiting grotesque misinformation as to the nature of the case.

Unquestionably the granting of certiorari by this Court would imply that there is some foundation for petitioner's absurd theory that he is the victim of discriminatory laws and practices arising out of a conflict between economic classes, to the infinite detriment of public confidence in our government, when in fact neither the alleged conflict nor the supposed economic classes ever existed.

Furthermore it would most certainly lead to wholesale attacks of a similar kind on countless hundreds of other judgments all over America, arousing quiescent

animosities to an extent which no one can now predict. To hold, on the grounds advanced by petitioner, that there is a substantial question as to the constitutional validity of the judgment below is to cast much greater doubt upon the laws and judgments of a great many American states the statutes of which actually prescribe property-owning and tax-paying qualifications for jury service much broader in exclusionary effect than the alleged Virginia practice of which petitioner complains.

By these proceedings petitioner claims the right to introduce evidence, offered for the first time in *habeas corpus* proceedings after an adverse verdict at his trial, to show an alleged practice of excluding from juries persons who have failed (as petitioner claims he has done) to pay annual poll taxes of one dollar and fifty cents. If such a contention commands the attention of this Court the way is surely open for an endless succession of like attacks and spurious crusades against the laws and judgments of such states as New York, where ownership of property is a legal prerequisite to eligibility for jury service[1], or Michigan, where only persons prosperous enough to be taxable may serve[2], or Indiana and Tennessee, where jurors must be "freeholders or householders"[3], or the numerous states where eligibility

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[1]Judiciary Law of New York, 502; 65 Consol. Laws (McKinney) §§1695c11, 1695d5, 1695e10, 1695f19, 1695g6. (Husbands or wives of persons possessing the required amount of property are eligible to serve.)

[2]Jurors are taken exclusively from assessment rolls, which do not include the names of "persons who, in the opinion of the supervisor and the board of review, by reason of poverty, are unable to contribute to the public revenue," the property of such persons being exempt from taxation. Compiled Laws of Michigan (1929) §§13723, 3412, 3395.

[3]Ann. Indiana Statutes (Burns 1933) §4-3317; Tennessee Code (Williams 1934) §10006.

for jury service depends on actual payment of taxes[4]. The harmful effect of implying a doubt as to the fundamental fairness of all such judgments is wholly incalculable.

THE FACTS

The testimony of the witnesses is reviewed at length in the opinion of the Supreme Court of Appeals of Virginia, *Waller* v. *Commonwealth,* 178 Va. 294, 313, 16 S. E. (2d) 808, and is summed up as follows:

> "* * * Here we have a case where an accused, after making threats against the life of his intended victim, proceeds to arm himself with a shotgun and pistol, goes to the home of his victim and, without any provocation, executes his previous threats by shooting his unarmed victim four times, twice in the back, as he walked away from him, and twice as he lay upon the ground. It is hard to conceive of a case where the elements of premeditation and malice stand out more prominently than they do in the case at bar.
>
> "In our opinion, the accused has had a fair and impartial trial, by an impartial jury; he has been convicted upon evidence adduced by members of his own race, which upon its face bears the impress of truth."

---

[4] *E.g.,* North Carolina (North Carolina Code Ann. [Michie 1939] §2312), and the states where only qualified electors are eligible for jury service and prepayment of poll taxes is a qualification for voting. Digest of Arkansas Statutes (Pope 1937) §8291, Constitution of Arkansas, Amendment 8; Code of Mississippi (1930) §2029, Constitution of Mississippi, Art. XXII §241; Constitution of South Carolina, Art. V §22, Art. II §4.

It may be added that though the accused offered as his only reason for shooting deceased that deceased "usually carried a gun and run his hand in his pocket like he was trying to pull out something," other witnesses testified that deceased did not own a pistol (Record of trial, Mrs. Davis, p. 98; Frank Davis, p. 102; Edgar Davis, p. 106). The evidence also shows that at the time he was shot the deceased did not wear a coat, which would have been necessary to conceal a pistol in his pants pocket. (*Id.* p. 99.) And although petitioner stated that when he fired deceased "run a bit," nevertheless, he admittedly shot four times. Medical testimony definitely established that two bullets entered the decedent's back (*Id.* p. 95). As to the other two, the surgeon could not be sure, but from the other evidence, including defendant's own testimony, the conclusion is inescapable that all four shots were fired from behind. It is not too much to say that the accused offered no substantial or credible defense at his trial, and on his own testimony no proper verdict other than first-degree murder could have been found.

After a judgment of conviction had been entered and affirmed petitioner commenced *habeas corpus* proceedings in which he offered, for the first time, to introduce evidence on the question whether persons who had failed to pay capitation taxes had been systematically excluded from juries in the county of venue. These proceedings resulted in the judgment complained of.

SUMMARY OF ARGUMENT

No substantial Federal question, not previously decided by this Court, is presented:

> Even if the facts alleged in the petition for *habeas corpus* constituted a prohibited discrimination, the existence of such facts cannot be brought in issue for the first time and inquired into in *habeas corpus* proceedings. *Andrews* v. *Swartz,* 156 U. S. 272; *Wood* v. *Brush,* 140 U. S. 278.
>
> The alleged Virginia practices in selecting jurors, even if they had actually existed, would not discriminate against a class or race of persons to which petitioner belongs. *Franklin* v. *South Carolina,* 218 U. S. 161. See *Strauder* v. *West Virginia,* 100 U. S. 303, 310.

ARGUMENT

I.

PETITIONER'S CONTENTION, MADE FOR THE FIRST TIME ON APPLICATION FOR *HABEAS CORPUS*, CANNOT BE INQUIRED INTO IN SUCH PROCEEDINGS.

The judgment of which petitioner complains is one denying an application for writ of *habeas corpus,* by which he sought to have the Supreme Court of Appeals review alleged errors at his trial.

It is not claimed that petitioner was not represented ably at his trial by astute and diligent counsel. On the contrary, the record shows that his attorneys were

extremely alert to take advantage of every possible technicality. They challenged the grand jury on the ground that the statute permitted only qualified voters, who had paid poll taxes for the three preceding years to serve, and that the grand jury had been drawn from a list composed of such persons, when as a matter of fact the record (p. 21) shows that the grand jury was a special one, not drawn from any list, but selected by the judge. (The court construed the statute as requiring no such qualification and overruled the motion, stating to counsel, "I selected the jury myself. I don't know whether they are qualified [to vote] or not," and, as stated in the petition for certiorari, one member of the grand jury was not so qualified and had paid no poll taxes for three years.)

At his trial petitioner made no offer to prove the facts as to poll tax payment, and admitted there had been no systematic exclusion of Negroes from juries in the trial court. (*Id.* p. 60.) Nor did the petitioner make any tender of proof with respect to the voting qualifications of persons composing the petit jury list. He contended that the law required voting qualifications and assumed that it had been complied with. The Supreme Court of Appeals of Virginia has made it clear that his contention as to the law was unfounded. *Waller* v. *Commonwealth, supra.*

Petitioner either properly raised the constitutional question of the composition of the jury in the trial court, or he failed to do so. If the question was properly raised, the Viginia Supreme Court of Appeals held it to be without merit, and that judgment was subject to review by this Court. But *habeas corpus* cannot be

invoked as a substitute for such a review. If petitioner failed to properly present the constitutional question in the State courts, he cannot now raise it by petition for a writ of *habeas corpus*. Not only are these principles well established by the decisions of this Court, but their application is essential to the orderly administration of justice. If an accused were permitted to go to trial without raising questions of this or similar kinds, taking his chances before the jury first selected, and later challenge in *habeas corpus* proceedings the method of selecting the jury, there would be no end of criminal proceedings. The courts would be swamped with innumerable such petitions based on every conceivable ground.

It is settled beyond question that alleged errors in trial of a case cannot be reviewed in *habeas corpus* proceedings unless they are such as to deprive the court of jurisdiction to render a valid judgment of conviction, and that errors such as petitioner alleges occurred with respect to the selection of jurors do not have that effect. In the case of *Wood* v. *Brush,* 140 U. S. 278, a writ of *habeas corpus* was sought on the ground that Negroes were systematically and intentionally excluded from the jury in the New York trial court. The accused explained that his failure to raise the question at the time of the trial was due to his ignorance of such practice, the existence of which he discovered only after final judgment, but this Court held that it is not within the scope of *habeas corpus* proceedings to inquire whether such errors have occurred at the trial. Said the Court:

> "* * * Whether the grand jurors who found the indictment, and the petit jurors who tried

the appellant, were or were not selected in conformity with the laws of New York—which laws, we have seen, are not obnoxious to the objection that they discriminate against citizens of the African race because of their race—was a question which the trial court was entirely competent to decide, and its determination could not be reviewed by the circuit court of the United States upon a writ of *habeas corpus* without making that writ serve the purposes of a writ of error. * * *" (140 U. S. at 285-6.)

The Court further said:

"* * * If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the court of general sessions, and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. *Savin, Petitioner,* 131 U. S. 267, 279; *Stevens* v. *Fuller,* 136 U. S. 468, 478. Nor would that error, of itself, have authorized the circuit court of the United States, upon writ of habeas corpus, to review the decision or disturb the custody of the accused by the state authorities. The remedy, in such case, for the accused, was to sue out a writ of error from this court to the highest court of the State having cognizance of the matters, whose judgment, if adverse to him in respect to any right, privilege or immunity, specially claimed under the Constitution or laws

> of the United States, could have been re-examined, and reversed, affirmed or modified by this court as the law required. Rev. Stat. section 709." (*Id.*, at 287.)

A later decision, on all fours with the case at bar, is the case of *Andrews* v. *Swartz*, 156 U. S. 272, in which the accused at the trial made the express objection that persons of African descent were purposely excluded from the grand and petit juries in a New Jersey State Court. He contended further that "the state court denied him the right to establish that fact by competent proof," a contention not even made here. In disposing of the argument that the judgment was void and within the reach of *habeas corpus*, Mr. Justice Harlan said:

> "* * * Even if it be assumed that the state court improperly denied to the accused, after he had been arraigned and pleaded not guilty, the right to show by proof that persons of his race were arbitrarily excluded by the sheriff from the panel of grand or petit jurors solely because of their race, it would not follow that the court lost jurisdiction of the case within the meaning of the well established rule that a prisoner under conviction and sentence of another court will not be discharged on habeas corpus unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void. *Ex parte Siebold*, 100 U. S. 375; *Wood* v. *Brush*, 140 U. S. 287; *Jugiro* v. *Brush*, 140 U. S. 297; *Pepke* v. *Cronan*, ante 84. When a state court has entered upon the trial of a criminal

> case, under a statute not repugnant to the Constitution of the United States, and has jurisdiction of the offense and of the accused, no mere error in the conduct of the trial should be made the basis of jurisdiction in a court of the United States to review the proceedings upon writ of habeas corpus." (156 U. S. at 276.)

Petitioner argues, however, that the decision in *Johnson* v. *Zerbst,* 304 U. S. 458, has overruled the principles laid down in the above cited and in numerous other decisions of this Court. But the *Johnson* case recognizes the fundamental principle that *habeas corpus* is an available remedy only where the judgment attacked is a *void* one. Mr. Justice Black states in his opinion that "A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine the facts for himself when if true as alleged they make the trial *absolutely void.*" (Italics supplied.) The opinion further holds that a Federal Court is without "jurisdiction to proceed to judgment and conviction" of an accused who is not represented by counsel, unless the accused intelligently *waives* his right to counsel. In the absence of jurisdiction, the judgment is of course *absolutely void.*

Certainly petitioner can find nothing in the case of *Johnson* v. *Zerbst, supra,* or elsewhere to abrogate the fundamental principle that objections to the selection of grand or petit jurors are waived unless seasonably made; that an accused fully represented by counsel of his own choice, may not withhold his objections to a jury until he learns their verdict and then demand another.

Petitioner made timely objection to the indictment and *venire facias* on the grounds that Virginia statutes required jury lists to be composed of qualified voters, but wholly failed, until after verdict and judgment against him, to raise the factual question of alleged discriminatory practices on the part of jury commissioners by adducing evidence in support of his allegations, without which evidence such a question surely cannot be raised. *Martin* v. *Texas*, 200 U. S. 316; *Brownfield* v. *South Carolina*, 189 U. S. 426; *Torrance* v. *Florida*, 188 U. S. 519; *Smith* v. *Mississippi*, 162 U. S. 592.

Furthermore, another factual question concerning which petitioner offered no proof is the question whether payment of a poll tax of one dollar and fifty cents draws such a line of cleavage between the residents of Pittsylvania County, Virginia, as that the selection of jurors from a list of poll tax payers would amount to a class discrimination. Petitioner claims the population may thus be divided into two economic classes—those who can afford to pay the tax and those who cannot. But is this by any means true? This question goes to the very heart of petitioner's contention. It is almost inconceivable that any considerable number of persons possessing the requisite health, intelligence, and other qualifications to serve on juries, in civil as well as criminal cases, are prevented by their economic condition from paying an annual tax of one dollar and fifty cents. Certainly no court would take judicial notice that such a condition exists, and this Court has expressly held that the burden is on the accused to support any such allegation by proof. In the case of *Franklin* v. *South Carolina*, 218 U. S. 161, the State Constitution required the payment six months

before an election of all poll taxes then due and payable in order for a person to be eligible to vote. The eligibility of grand jurors was limited to electors. Franklin contended that since this operated to exclude from the grand jury persons who had not paid their poll taxes, it operated to exclude persons of the Negro race. But this Court refused to draw any such factual inference. On the contrary, the opinion of Mr. Justice Day states:

> "* * * In this class of cases, when the real objection is that a grand jury is so made up as to exclude persons of the race of the accused from serving in that capacity, it is essential to aver and prove such facts as establish the contention." (218 U. S. at 167.)

It is apparent, therefore, that petitioner clearly waived any objections he might have had—objections which in no event go to the jurisdiction of the court—to the selection of jurors in his case by failing to raise the same before verdict was rendered, and hence such objections are not available to him in *habeas corpus* proceedings.

In this connection it is contended by petitioner that while Federal Courts will not thus interefere by *habeas corpus* with judgments of State Courts, this petition for *certiorari* is to review the action of the Supreme Court of Appeals of Virginia in refusing a writ of *habeas corpus*, and that the question is whether under the law of Virginia the constitutional rights of pettiioner were violated by refusal to grant the writ. The law of Virginia with respect to the use of *habeas corpus* to correct mere errors in the trial of a criminal case, or to permit

a convicted person to raise questions which he should have raised at the trial, but did not, or to permit him to prove facts which he could have proved, but did not prove in the trial court, is the same as that laid down by the decisions of this Court. It is thus stated in Ex parte *Rollins,* 80 Va. 314, 316:

> "It is a well-established and undisputed principle that mere errors in the proceedings of a court of competent jurisdiction cannot be reviewed on *habeas corpus.* In such case the remedy, if any, is by writ of error or appeal. But where the proceedings under which the party complaining is detained in custody are void, as where the court is without jurisdiction, the same are reviewable on *habeas corpus,* and the party will be discharged."

Thus *habeas corpus* clearly will not lie in the case at bar.

II.

PETITIONER'S ALLEGATIONS DO NOT SHOW A DISCRIMINATION AGAINST A RACE OR CLASS OF PERSONS TO WHICH PETITIONER BELONGS.

In the *habeas corpus* proceedings below, as well as at his trial, petitioner offered nothing more than a highly dubious conclusion of his counsel to show that exclusion of persons who had not actually paid their poll taxes would operate to discriminate against any particular race or economic class of persons, or even that he himself belongs to any such class.

Assuming that economic *ability* to pay a tax of one dollar and fifty cents is an acceptable standard to distinguish one economic class from another, it certainly does not follow that the actual payment or non-payment of the tax substantially reflects this distinction. It is a matter of common knowledge, for instance, that great numbers of prosperous people do not pay their poll taxes (payment being unenforceable by legal process within three years after they are due), while many of our poorest citizens do. Petitioner has nowhere made or offered to make any showing in support of his very doubtful assumption that to classify the population according to actual payment of poll taxes even approximates a classification according to economic *ability* to pay them, and this case falls squarely within the rule laid down by this Court in *Franklin* v. *South Carolina, supra.*

Likewise, petitioner makes no showing of his own economic inability to pay the tax. On the contrary, even if there were an economic class of our citizens, including "share croppers," physically and mentally competent to serve on juries but unable to pay a poll tax of one dollar and fifty cents, it affirmatively appears that petitioner was not one of them. His own testimony shows that he was employed in Maryland at the time of the homicide, and happened to be in Pittsylvania County, Virginia, only because he had come there for the week-end to celebrate his birthday (Record of trial, p. 118.) It also appears that he had completed a three-year high school education (*Id.*, p. 116), and owned such luxuries as a shotgun and pistol (*Id.*, p. 122).

Hence he was clearly not within the alleged economic class which he claims was discriminated against.

Finally, it should be observed that petitioner's contentions presuppose that all of the laws in other States which make ownership of property or payment of taxes essential to eligibility for jury service are flagrantly unconstitutional, and his counsel simply ignore this Court's opinion in *Strauder* v. *West Virginia,* 100 U. S. 103, where it is expressly pointed out that a State "may confine the selection [of jurors] to males, *to freeholders* to citizens" etc. (100 U. S. at 310. Italics supplied.)

Constitutionality of Requiring Poll Tax Payment as Prerequisite to Voting Not Involved.

Petitioner seeks to inject into this case a question as to the constitutionality of Virginia election law requirements that all poll taxes due for the three years preceding an election must be personally paid as a prerequisite to the right to vote. His objection to such requirements is based on his contention that the poll tax provides a means of distinguishing one economic class from another.

It should be observed that poll taxes are assessed, entirely independently of the election laws, against all residents of the State, including aliens, persons domiciled elsewhere but temporarily residing in Virginia, those who fail to register or are unable by reason of illiteracy to do so, and those who are disfranchised by conviction of felony. (See Tax Code § 22, p. xvii of appendix to petitioner's brief.) If there were any question as to the

constitutionality of requiring prepayment of the tax as a condition of suffrage, there would still be none as to the validity of the tax itself.

It is obvious, therefore, that the validity or invalidity of such election law requirements cannot be brought in issue here, since the tax to which petitioner objects must stand in any event.

CONCLUSION

We most earnestly submit that the petition for writ of certiorari presents no substantial Federal question and that the writ should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM 1941

No. 1097

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

PETITION FOR REHEARING OF THE DENIAL OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

JOHN F. FINERTY,
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To the Honorable the Supreme Court of the United States:

Exceptional reasons, it is respectfully submitted, exist for the granting of rehearing herein.

The Governor of Virginia, *following denial by this Court on May 4, 1942 of certiorari herein without opinion,* has postponed petitioner's execution from May 19 to June 19, 1942, expressly for the purpose of permitting a petition for rehearing of such denial to be filed.

The present Governor and his predecessors have considered the constitutional questions presented by petitioner of sufficient importance that, with courageous and humane disregard of any political considerations, they thus have gone to the unusual length of granting petitioner four stays of execution in order that he might obtain answers to those questions from this Court.

The denial of certiorari without opinion affords no answer to those questions.

In determining whether those questions are entitled to specific answer, it is respectfully submitted that this Court may also properly consider the fact that it has only been possible to bring those questions before this Court as a "test case" by reason of the aid of public spirited citizens and of volunteer counsel, whose sole interest has been to determine whether protection exists against the violation of the apparent constitutional rights of an entire economic class of citizens who, because of their economic and political disabilities, are themselves powerless to protect those rights.

The constitutional and procedural questions left unanswered by the mere denial of certiorari without opinion are the following:

Was certiorari denied because:

1. The equal protection clause of the Fourteenth Amendment is limited to systematic exclusion from grand and petit juries solely because of race or color?

2. Even if not so limited, and even though that clause would extend to systematic exclusion because of religion, politics or nativity, it nevertheless does not extend to such exclusion, because of its economic disabilities, of petitioner's entire class?

3. Even though the equal protection clause would otherwise extend to such systematic exclusion of petitioner's entire economic class from grand and petit juries, no remedy is available by habeas corpus or otherwise, and petitioner must die, solely because of the error of his trial counsel as to the procedure necessary to establish the undenied and undeniable facts of such exclusion?

Counsel most respectfully submit that petitioner, being under sentence of death, is peculiarly entitled to an answer to these questions, and to have them answered only after the fullest presentation and consideration; that neither full presentation or consideration is possible

under the limitations prescribed by the rules of this Court both upon briefs in support of petitions for certiorari and upon petitions for rehearing; that unless this Court does answer these constitutional and procedural questions, the future administration of criminal law in the State of Virginia will be left in hopeless and unnecessary confusion, and this Court will be burdened with further appeals for review which must prove either unnecessary or futile.

Finally, counsel most respectfully submit that if rehearing is granted, it is their profound conviction that, on the following grounds, this Court, on further and mature consideration of the questions here involved, must conclude that petitioner's constitutional rights have clearly been violated; that habeas corpus affords a clear and proper remedy for such violation; and therefore either that certiorari should issue to review the judgment of the Supreme Court of Appeals of Virginia denying habeas corpus, or that this Court should issue to petitioner its own original writ of habeas corpus or expressly recognize the right of a lower Federal court to issue that writ.

The following are specific grounds on which it is submitted rehearing should be granted, and that thereupon either certiorari should issue, or this Court should expressly recognize petitioner's right to a writ of habeas corpus, either from this Court or from a lower Federal court.

1. *The denial of certiorari here would seem in necessary conflict with the recent decisions of this Court in* Waley v. Johnston, —— U. S. ——, 86 L. Ed. 932, *and* Bowen v. Johnston, 306 U. S. 19,* *holding that a judgment of conviction, even though not void for want of jurisdiction of the trial court, is properly reviewable on habeas corpus,*

* Counsel regret that they failed in their brief in support of the petition for certiorari to call the attention of this Court to the relevance of certain decisions now cited for the first time in this petition.

(a) *If, as here, such conviction was in disregard of petitioner's constitutional rights;*

(b) *If, as here, the facts relied on to show such violation are dehors the record and their effect on the judgment of conviction was not open to consideration and review on appeal, and*

(c) *If, as here, the writ of habeas corpus is the only effective means of preserving petitioner's constitutional rights.*

2. *The decisions in* Waley v. Johnston, supra, *and* Bowen v. Johnston, supra, *though directed to judgments of conviction in Federal courts, would seem no less applicable to petitioner's conviction in a State court where, as here, all state remedies have been exhausted,* Hale v. Crawford, 65 Fed. (2d) 739, 747 (certiorari denied 290 U. S. 674).

3. *Even should this Court finally deny certiorari here, this would not, under Moore* v. *Dempsey,* 261 U. S. 86, *constitute a bar to petitioner's right to a writ of habeas corpus from the United States District Court for the Eastern District of Virginia, even though the petition for such writ of habeas corpus were to be based on exactly the same grounds here presented to this Court by the petition for certiorari.*

4. *The decisions in Wood* v. *Brush,* 140 U. S. 278 and *Andrews* v. *Swartz,* 156 U. S. 272, *cited in respondent's brief in opposition, are clearly inapplicable to petitioner's case. In those cases, habeas corpus was held not to afford a proper remedy to review the judgments of conviction in the state courts there involved, (a) because, before applying to a Federal court for habeas corpus, the accused had not resorted to direct review by this Court, available there, but not here, as a matter of right; (b) because there, upon direct review, the question of violation of con-*

stitutional rights could have been determined, since there, unlike here, the facts constituting such violation appeared of record in the trial court.

5. *Assuming that petitioner might have waived his constitutional right to indictment and trial by juries from which his economic peers had not been systematically excluded, it would seem that, consistently with* Patton v. U. S., 281 U. S. 276, *and* Johnson v. Zerbst, 304 U. S. 458, *there could be no such waiver except by petitioner's "express and intelligent consent", and that no mere error of petitioner's counsel as to the procedure necessary to establish violation of such constitutional rights could constitute such waiver.*

6. *It would appear that this Court could not hold that the equal protection clause of the Fourteenth Amendment is limited to denial because of race or color, in view of its decisions, not heretofore cited, in which this Court has expressly held that clause to extend to inanimate corporations, of no race and no color.*

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26;

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232;

Covington & L. Turnp. Road Co. v. Sanford, 164 U. S. 579;

Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U. S. 544;

Power Mfg. Co. v. Saunders, 274 U. S. 490.

7. *Exclusion of non-payers of poll taxes from jury service is in reality a means of indirect exclusion because of race and color, since, as alleged in the petition for certiorari, p. 9, negroes constitute a large proportion of the persons so barred. Moreover it has the advantage of avoiding the recognized illegality of direct exclusion on account of race and color, with the added advantage of also excluding poor whites as well as negroes.*

8. *Finally, the denial here of certiorari, without opinion,*

(a) *Leaves the future administration of criminal law in the State of Virginia in hopeless and unnecessary confusion;*

(b) *May well burden this Court with appeals for review in future cases, which must prove either futile or unnecessary;*

(c) *Constitutes a practical bar to a remedy otherwise clearly available under the decisions in* Moore v. Dempsey, supra, *and* Hale v. Crawford, supra, *that is, a petition for habeas corpus to the United States District Court for the Eastern District of Virginia.*

(d) *Most important to petitioner, it leaves petitioner's counsel without any basis for forming an intelligent judgment as to whether petitioner has the Constitutional rights here claimed; whether those rights have been violated; whether remedy exists for their violation under Moore* v. *Dempsey, supra, and Hale* v. *Crawford, supra; and, if so, what is the proper procedure to obtain such remedy.*

Counsel trust that in view of the importance of the questions presented by the foregoing grounds, this Court will not consider a further brief exposition of certain of those grounds to exceed the limits placed by its rules on petitions for rehearing.

I

It would seem that consistently with *Waley* v. *Johnston, supra,* and *Bowen* v. *Johnston, supra,* this Court should grant certiorari herein and thereupon require the Supreme Court of Appeals of Virginia to issue its writ of habeas corpus or, consistently with *Moore* v. *Dempsey, supra* and *Hale* v. *Crawford, supra,* this Court should expressly recognize the right of petitioner either to obtain a writ of habeas corpus from the United States District Court for the Eastern District of Virginia or to obtain from this Court its own original writ of habeas corpus.

***Wood* v. *Brush* and *Andrews* v. *Swartz, supra,* distinguished.**

It has long been contended, and the respondent so contends in his brief in opposition, that a conviction cannot be reviewed by habeas corpus unless the judgment of conviction be void for want of jurisdiction of the trial court to render it. Prior language of this court, taken out of its context, has lent color to such contentions. The recent decisions of this court, however, in *Waley* v. *Johnston, supra,* and *Bowen* v. *Johnston, supra,* make such contentions no longer tenable.

Those decisions make it clear that while want of jurisdiction of the trial court to render a judgment of conviction affords *one ground* for habeas corpus, *it is not the sole ground.*

On the contrary, it is clear from those cases that violation of constitutional rights in the conviction of an accused, in itself affords proper ground for habeas corpus, even though the judgment of conviction is not void for want of jurisdiction:*

* Indeed, this is no new doctrine. The limitations imposed by the rules of this Court, on petitions for rehearing, do not permit of an adequate discussion of former decisions of this Court to substantially this same effect. Attention, however, is directed to the language of this Court in this respect in two of its early decisions.

(Footnote continued on next page)

(a) if the facts relied on to show such violation are dehors the record;

(b) if the effect of those facts on the judgment of conviction was not open to consideration and review on appeal; and

(c) if the writ of habeas corpus is the only effective means of preserving such constitutional rights.

In *Ex Parte Lange,* 18 Wall. 163, this Court, in discharging the petitioner there, upon this Court's original writ of habeas corpus, said, pages 175-176:

> "But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void.
>
> But we do not concede the major premise in this argument. A judgment may be erroneous and not void and it may be erroneous because it is void. The distinctions between void and merely voidable judgments are very nice and they may fall under the one class or the other as they are regarded for different purposes."

In *Ex Parte Neilson,* 131 U. S. 176, this Court, in reversing denial of habeas corpus by a district court, said, page 182:

> "The objection to the remedy of habeas corpus, of course, would be that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on habeas corpus. But there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. This was so decided in the cases of *Ex Parte Lange,* 85 U. S. 18 Wall. 163 and *Ex Parte Siebold,* 100 U. S. 371 and in several other cases referred to therein."

At pages 183-184, this Court further said:

> "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant."

Furthermore, Mr. Chief Justice Hughes, in *Bowen* v. *Johnston,* made it clear that while this court ordinarily will not review by habeas corpus a judgment of conviction even of a Federal court, where the right to direct review by this court exists, and has not been exhausted, this has not been because of any question of power to make such review by habeas corpus, but a question of the appropriate exercise of such power.

Finally, it is pointed out in *Hale* v. *Crawford, supra,* that the ordinary rule that habeas corpus may not be used to review a judgment of conviction in a State court, even though such judgment violates constitutional rights, unless not only State remedies but any right to direct review by this court of their denial have been exhausted, was a rule of procedure which grew up prior to the amendment of the Judiciary Act of 1925, when direct review by this court under a writ of error was a matter of right; that since that amendment changed review by this court to a matter of discretion under certiorari, a Federal court now can review such judgment by habeas corpus, even after this court has denied review by certiorari. (See in this latter respect subsequent discussion under Point II of Moore v. Dempsey, 261 U. S. 86.)

For the convenience of this Court, brief quotation will accordingly be made from the foregoing cases.

In *Waley* v. *Johnston, supra,* this Court said, page 934:

> "The issue here was appropriately raised by the habeas corpus petition. *The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts* to test the constitutional validity of a conviction for crime *is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused,*

and where the writ is the only effective means of preserving his rights. Moore v. Dempsey, 261 U. S. 86; Mooney v. Holohan, 294 U. S. 103, Bowen v. Johnston, 306 U. S. 19."

In *Bowen* v. *Johnston, supra,* Chief Justice Hughes said, pages 23-24:

"The scope of review on habeas corpus is limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged. (Citing decisions.) But if it be found that the court had no jurisdiction to try the petitioner, *or that in its proceedings his constitutional rights have been denied, the remedy of habeas corpus is available.* Ex Parte Lange, 18 Wall. 163; Ex parte Crow Dog, 109 U. S. 556; Re Snow, 120 U. S. 274; Re Coy, 127 U. S. 751; Re Nielsen, 131 U. S. 176; Re Bonner, 151 U. S. 242; Moore v. Dempsey, 271 U. S. 86; Johnson v. Zerbst, 304 U. S. 458."

The Chief Justice further said, pages 26-27:

"It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. Ex parte Lange, 18 Wall. 163, supra. *The rule requiring resort to appellate procedure* when the trial court has determined its own jurisdiction of an offense *is not a rule denying the power to issue a writ of habeas corpus* when it appears that nevertheless the trial court was without jurisdiction. *The rule is not one defining power but one which relates to the appropriate exercise of power.* It has special application where there are essential questions of fact determinable by the trial court. Rodman v. Pothier, 264 U. S. 399, supra. It is applicable also to the determination in ordinary cases of disputed matters of law whether they relate to the sufficiency of the indictment or to the validity of the statute on which the charge is based. Ibid; Glasgow v. Moyer, 225 U. S. 420, supra; Henry v. Henkel, 235 U. S. 219, supra. *But it is equally true that the rule is not so*

inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

In *Hale* v. *Crawford, supra,* the Circuit Court of Appeals for the First Circuit said, page 747 of its decision, in referring, among other cases, to *Andrews* v. *Swartz,* and *Wood* v. *Brush, supra*:

"Counsel for Crawford contend that these cases are not applicable for, if he were remitted to Virginia and seasonably and properly raised the question here under consideration and the question was decided against him, at the present time and under the Judiciary Act of 1925, he could not, as of right, prosecute a writ of error from the Supreme Court of the United States to the highest court of the state of Virginia to which the case could be taken. *It is true that his right of review by writ of error from the Supreme Court of the United States on the facts of this case was taken away by the act of 1925,* for under the law as it now stands no writ of error lies from the Supreme Court in this case, as the grand jury was not drawn under a statute of the state of Virginia which violated the Constitution of the United States. 43 Stat. 936, 937, c. 229, § 237 (28 USCA § 344). *He is, however, permitted by that act to apply to that court for certiorari, a discretionary writ.* South Carolina v. Bailey, supra. *If review on such application is not granted he undoubtedly, at that stage of the proceeding, could have the matter reviewed on habeas corpus in the proper federal court, being without review in the Supreme Court on writ of error as of right.* In re Royall, 117 U. S. 241, 252, 253, 6 S. Ct. 734, 29 L. Ed. 868; In re Wood, supra, 140 U. S. at pages 289, 290, 11 S. Ct. 738, 35 L. Ed. 505. *It would not then be an endeavor by habeas corpus to intervene before trial or to review what ordinarily can be reexamined only on writ of error; and the federal court applied to could not, under such circumstances, properly refuse review on habeas corpus.*"

Petitioner's case, it is submitted, meets every condition which, under the principles of the foregoing decisions, would make habeas corpus a proper remedy to review petitioner's conviction. Moreover, it is submitted, petitioner's case is clearly distinguishable from *Andrews* v. *Swartz, supra,* and *Wood* v. *Brush, supra,* where, on the record in those cases, resort to habeas corpus was held improper.

In *Andrews* v. *Swartz, supra,* and *Wood* v. *Brush,* resort to habeas corpus was held improper on two grounds: First, because although state remedies had been exhausted, the accused, before applying to a Federal court for habeas corpus, had not resorted to the direct review of the judgment of the State court there available from this Court as a matter of right by writ of error. Second, because there, upon direct review, the question of violation of constitutional rights could have been determined, since the facts constituting such violation appeared of record in the trial court.

Here, on the contrary, while State remedies have unquestionably been exhausted, no right of direct review by this Court of the judgment of the State court was ever available as a matter of right by writ of error, but only as a matter of discretion by certiorari.

Here, moreover, the facts relied on to show violation of petitioner's constitutional rights are dehors the record, and, therefore, those facts and their effect on the judgment of conviction would not have been open to consideration and review by this Court on direct review by certiorari of the judgment of conviction.

Here, therefore, the writ of habeas corpus is and at all times has been the only effective means on this record of preserving petitioner's constitutional rights.

It would seem, therefore, that, under the cases cited, and in particular under *Bowen* v. *Johnston, supra,* taken in connection with *Hale* v. *Crawford, supra,* the petitioner is entitled to obtain by some means a writ of habeas corpus to review his judgment of conviction.

In this connection, the decision of this Court in *Moore* v. *Dempsey, supra,* makes it clear that, even if this Court should finally deny certiorari here, this would constitute no legal bar to an application to the United States District Court for the Eastern District of Virginia for a writ of habeas corpus, even though such application were based on the same grounds presented to this Court by the petition for certiorari. In all probability, however, should this Court persist in its refusal to state its grounds for denial of certiorari, the District Court would deny the writ, on the assumption that such denial means either that petitioner's constitutional rights have not been violated, or that, if they have, petitioner is without remedy because of the error of his trial counsel in failing to prove in the trial court the facts of such violation. However, in such event, it would seem that, under *Moore* v. *Dempsey,* this Court should nevertheless require the District Court to issue habeas corpus.

Since *Moore* v. *Dempsey* would seem thus to be of compelling significance here, that decision will be briefly discussed.

II

Under *Moore* v. *Dempsey*, 261 U. S. 86, even should this Court finally deny certiorari here, this would not constitute a bar to petitioner's right to a writ of habeas corpus from the United States District Court for the Eastern District of Virginia, even though the petition for such writ of habeas corpus were to be based on exactly the same grounds here presented to this Court by the petition for certiorari.

In *Moore* v. *Dempsey, supra,* this Court, although it had previously denied certiorari to review on constitutional grounds the judgment of conviction in the state court, and had also denied a writ of error to review a later denial of habeas corpus by the state court, held habeas corpus nevertheless available from the appropriate Federal district court, even though the grounds alleged for habeas corpus were identical with the grounds presented by the petitions for certiorari and for writ of error, previously denied by this Court.

In *Moore* v. *Dempsey,* this Court, on appeal, reversed an order of the District Court for the Eastern District of Arkansas, dismissing a writ of habeas corpus, and thereupon required the District Court to issue the writ. Moreover, this Court, speaking through Mr. Justice Holmes, required the issuance of habeas corpus by the District Court, in spite of the following facts pointed out in the dissenting opinion of Mr. Justice McReynolds, joined in by Mr. Justice Sutherland.

It there appears, page 98:

> "A petition for certiorari, filed in this court May 24, 1920, with the record of proceedings in the state courts, set forth in detail the very grounds of complaint now before us. It was presented October 5th, denied October 11th, 1920.

> April 29, 1921, the governor directed execution of the defendants on June 10th. June 8th the chancery court of Pulaski county granted them a writ of habeas corpus; on June 20th the state supreme court held that the chancery court lacked jurisdiction and prohibited further proceedings. State v. Martineau, 149 Ark. 237, 232 S. D. 609. August 4th a justice of this court denied writ of error. Thereupon, the governor fixed September 23rd, for execution. On September 21st the present habeas corpus proceeding began, and since then the matter has been in the courts."

It is also significant to note that it appears from the same page of the opinion that one of the grounds alleged, not only for habeas corpus, but previously for certiorari and for writ of error, was the systematic exclusion of negroes from grand and petit juries in the State of Arkansas.

It would seem not unreasonable to assume from this statement of the record in *Moore* v. *Dempsey* that one of the grounds for the dismissal of the writ of habeas corpus by the District Court may well have been the fact that this Court, had denied, *without opinion*, both the prior petition for certiorari and the prior application for writ of error. Nor, as has already been suggested, is it unreasonable to assume that were petitioner here to make application for habeas corpus to the District Court for the Eastern District of Virginia, that Court, in the face of a denial of certiorari by this Court *without opinion*, would likewise deny habeas corpus.

In such event, petitioner, due to the amendments of 1925 to the Judiciary Act, could not have, as had the petitioners in *Moore* v. *Dempsey*, review by this Court of such denial as a matter of right, or even review as of right by the Circuit Court of Appeals. On the contrary, petitioner could not even have appeal to the Circuit Court of Appeals except on a certificate of probable cause either by that

Court or by the District Court, (Title 28, Sec. 466, U. S. C. A.). Furthermore, should both the District Court and the Circuit Court of Appeals refuse such certificate, no appeal would lie to this Court (Title 28, Sec. 345, U. S. C. A.), and this Court would be without jurisdiction even to grant certiorari (Title 28, Sec. 347, U. S. C. A.). Therefore, should the right to appeal to the Circuit Court of Appeals be denied, petitioner's only recourse would be an application to this Court for an original writ of habeas corpus.

This, indeed, was the very situation which arose in *Mooney* v. *Holohan,* 294 U. S. 103. In that case, prior to the application to this Court for an original writ of habeas corpus, a certificate of probable cause for appeal to the Circuit Court of Appeals from the denial of the writ by the District Court, had been refused both by the District Court and by the Circuit Court of Appeals. On representation of these facts to this Court in the petition to it in the *Mooney* case for an original writ of habeas corpus, this Court thereupon recognized the right to apply to this Court for such original writ. Presumably, petitioner, under similar circumstances, here would have a similar right.

The question remains whether this Court, therefore, should put petitioner, who is under sentence of death and in indigent circumstances, to the circuity of action which would be involved in a petition to the United States District Court for the Eastern District of Virginia for habeas corpus, should this Court here finally deny certiorari.

Counsel most respectfully submit that the more appropriate and orderly procedure would be for this Court to grant rehearing herein, and thereupon to require the Supreme Court of Appeals of Virginia to accord petitioner its writ of habeas corpus. Should this Court fail to do this, petitioner's only practical remedy would seem to be an application direct to this Court for its own original writ of habeas corpus.

III

Assuming that petitioner might have waived his constitutional right to indictment and trial by juries from which his economic peers have not been systematically excluded, this court should hold that, consistently with the principles of *Patton* v. *United States,* 281 U. S. 276 and *Johnson* v. *Zerbst,* 304 U. S. 458, such waiver could only be by petitioners "express and intelligent consent," and that no mere error of petitioner's counsel could constitute such waiver.

In *Carruthers* v. *Reed,* 102 Fed. 933, the Court said, in connection with the systematic exclusion of negroes from grand and petit juries, page 939:

> "The right to challenge the panel (for systematic exclusion of negroes) is a right that may be waived and is waived if not seasonably presented."

There the Court noted, page 938, however, that the record expressly showed that counsel for accused had deliberately waived the right to make such challenge, concluding after mature consideration, first, that to raise the question might prejudice his client's interests, and, second, that the jury panel was a favorable one or, as he expressed it, "a very good jury".

The record here shows no such waiver before the trial court, even by petitioner's counsel. On the contrary, it shows that petitioner's counsel specifically moved to quash both the grand and petit juries, as violating petitioner's right to equal protection of the laws by reason of the systematic exclusion therefrom of non-payers of poll taxes, constituting petitioner's entire economic class (R. 18-19, Ex. 1, pp. 31-32). Moreover, it shows that petitioner's trial counsel did not offer evidence of the facts of such exclusion, first, because of their erroneous belief that the Constitution and laws of Virginia required such exclusion as a matter of law (R. 18-19, Ex. 1, pp. 59-60) and second,

because of their failure to take the precaution of proving the facts of such exclusion, lest the Supreme Court of Appeals of Virginia should, as it subsequently did, specifically hold that such exclusion was not required by law. Moreover, the record shows that, on the writ of error to the Supreme Court of Appeals to review petitioner's conviction (R. 18-19, Ex. 1, pp. 5-10), petitioner's counsel again specifically alleged unconstitutional exclusion, still, however, on the assumption that it was required by the Constitution and laws of Virginia, a point not theretofore specifically decided by that Court.

It would seem clear that neither the error of petitioner's counsel, in assuming that the Constitution and laws of Virginia required such exclusion, nor their error as to the necessity of proof of the facts of such exclusion, could constitute a waiver of petitioner's constitutional rights against such exclusion.

On the contrary, it would seem that this Court should hold that, consistently with the principles declared by this Court in *Patton* v. *United States, supra,* and *Johnson* v. *Zerbst, supra,* as to the safeguards against the waiving of constitutional rights, petitioner's constitutional rights could not here have been waived except by petitioner's own "express and intelligent consent".

It is true that in *Patton* v. *United States, supra,* waiver of the constitutional right there involved was the right to trial by jury at all, while, in *Johnson* v. *Zerbst, supra,* it was the right to protection of counsel.

It would seem that no reason can be advanced, however, why like safeguards should not attend any waiver of petitioner's right to indictment and trial by a constitutional jury. On the contrary, this Court has recently said in the case of *Glasser* v. *United States,* —— U. S. ——, 86 Law Ed. 405, 412:

> "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

On this record, it is clear that there was no "express and intelligent consent" by petitioner to any waiver of his constitutional rights to trial by a jury from which his economic peers had not been systematically excluded. On the contrary, it must be assumed that petitioner intended to insist on those rights and relied, as he had a right to do, upon his counsel for their adequate protection. The error of his counsel as to what procedure was necessary adequately to protect those rights certainly should not be held the equivalent of "express and intelligent consent" to the waiver of them by petitioner.

IV

It would appear that this Court could not have denied certiorari on the ground that the equal protection clause of the 14th Amendment is limited to denials solely because of race or color, in view of its decisions, not heretofore cited, in which this Court has held that clause to extend to inanimate corporations, of no race and no color.

Counsel in their brief in support of the petition for certiorari failed to call the attention of this Court to the following decisions in which it has directly held that the equal protection clause of the 14th Amendment extends to corporations:

Minneapolis & St. L. R. Co. v. *Beckwith,* 129 U. S. 26;
Bell's Gap R. Co. v. *Pennsylvania,* 134 U. S. 232;
Covington & L. Turnp. Road Co. v. *Sandford,* 164 U. S. 579;

Kentucky Finance Corp. v. *Paramount Auto Exchange Corp.*, 262 U. S. 544;
Power Mfg. Co. v. *Saunders*, 274 U. S. 490.

Moreover, counsel failed to make clear the real significance of the decision of this Court in *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89, referred to at page 9 of that brief. While, in that case, this Court held that the State license tax there in question did not arbitrarily discriminate against the corporation there affected, this Court implicitly recognized that, had such tax done so, the provisions of the equal protection clause of the 14th Amendment would have applied to the corporation.

Furthermore the language quoted, from that case, and from other cases at pages 4 to 14 of the brief in support of the petition for certiorari, would seem to make clear that, since the equal protection clause of the 14th Amendment is not limited to denials because of race or color, it must extend not only to denials because of politics, religion and nativity, but to denials because of economic disabilities of a particular class, or to any other arbitrary class discrimination.

Finally, on this point, as shown at p. 9 of the petition for certiorari, and at pp. 14-22 of the brief in support of that petition, poll taxes in Virginia are, in reality, a means of indirect exclusion because of race or color, since negroes constitute a large proportion of those unable to pay poll taxes on account of their economic disabilities; that, as such, poll taxes avoid the patent illegality of direct exclusion on account of race or color, and have the added advantage of killing two birds with one stone, in that they exclude poor whites as well as negroes.

V

The denial of certiorari without opinion leaves the future administration of criminal law in the State of Virginia in hopeless and unnecessary confusion, and, unless this court at least states the grounds of such denial, this court will undoubtedly be burdened with appeals for review, in future cases, which must prove either futile or unnecessary.

It is respectfully submitted that this Court should keep in mind that the sworn facts presented by the petition for habeas corpus to the Supreme Court of Appeals of Virginia, showing the systematic exclusion of non-payers of poll taxes from grand and petit jury service, stand undenied on this record. Moreover, counsel submit, those facts cannot be denied.

It must be clear, therefore, that, until this Court expressly states whether certiorari was here denied because the 14th Amendment does not extend to such systematic exclusion of petitioner's entire economic class, or was denied because of the error of petitioner's trial counsel in failing to prove the facts of such exclusion on the record before the trial court, the State of Virginia may well continue to practice such exclusion, and its courts may and undoubtedly will reject or disregard proof of such exclusion, if such proof be made or offered.

On the other hand, counsel for defendants in future cases cannot know whether grand or petit juries are open to challenge because of such systematic exclusion, and whether, therefore, it will be futile to offer proof of such exclusion or, should such proof be made and the courts of Virginia reject or disregard it, whether appeal to this Court for review will be warranted or will be wholly futile.

Most important to petitioner, however, is the fact that denial of certiorari without opinion leaves petitioner's counsel without any basis for forming an intelligent judgment as to whether petitioner has the constitutional rights here claimed; whether those rights have been violated; whether remedy exists for their violation under *Moore* v. *Dempsey* and *Hale* v. *Crawford, supra,* and, if so, what is the proper procedure to obtain such remedy.

Conclusion

In *Pierre* v. *Louisiana,* 306 U. S. 354, this Court said, page 358:

> "Indictment by a Grand Jury and trial by a jury cease to harmonize with our traditional concepts of justice at the very moment *particular groups, classes* or races—otherwise qualified to serve as juries in a community—are excluded from such jury service."

In *Smith* v. *Texas,* 311 U. S. 128, this Court said, page 130:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws under it but is at war with our basic concepts of a democratic society and a representative government."

Though both those cases specifically involved only the exclusion of negroes from jury service, it would seem improbable that this Court would now hold that the principles there announced were intended to be confined solely to exclusion solely because of race or color. The express language, particularly in *Pierre* v. *Louisiana,* would seem to preclude any such limitation.

Furthermore, it seems incredible that this Court could hold that the fundamental rights recognized by those principles can be protected only if the facts of their violation can be presented to this Court on certiorari to review a judgment of conviction obtained in violation of those rights, and that such rights cannot be protected where, as here, the undenied facts of violation can only be presented on habeas corpus, because of absence of proof of them in the record before the trial court. So to hold would make the protection of constitutional rights depend, not upon the undenied facts of their violation, but upon the procedure by which those facts are shown to this Court.

Finally, counsel here feel a heavy responsibility to this Court and to the petitioner in having failed in their brief in support of the petition for certiorari to present to this Court certain of the foregoing matters which now, for the first time, are called to its attention by this petition for rehearing.

Counsel most earnestly submit, however, that neither such failure on the part of counsel here, nor any error of trial counsel as to the procedure necessary to bring before this Court the undenied and undeniable facts of violation of petitioner's constitutional rights, should now prevent further and more mature consideration of the questions here presented, and certainly could not justify permitting the execution of petitioner in violation of his constitutional rights.

It is therefore respectfully submitted that this Court should grant rehearing herein and that, upon such rehearing, this Court should either

(a) Issue its writ of certiorari to the Supreme Court of Appeals of Virginia requiring that Court to issue a writ of habeas corpus; or

(b) Expressly recognize petitioner's right to obtain a writ of habeas corpus either from the United States District Court for the Eastern District of Virginia or from this Court itself.

For the reasons already given the first procedure would seem the more appropriate and orderly.

Respectfully submitted,

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THOMAS H. STONE,
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ERNEST FLEISCHMAN,
of Counsel.

Certificate

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

JOHN F. FINERTY,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1097

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, Superintendent of the State Penitentiary, Richmond, Va.,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, IN SUPPORT OF PETITION FOR REHEARING.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR REHEARING.

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NATIONAL URBAN LEAGUE
AMERICAN CIVIL LIBERTIES UNION
UNION FOR DEMOCRATIC ACTION
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By: ARTHUR GARFIELD HAYS,
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JOSEPH A. PADWAY
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Motion is hereby respectfully made, on behalf of all the organization and individuals signing the subjoined brief, for leave to file such brief, as amici curiae, in support of the petition for rehearing herein.

ARTHUR GARFIELD HAYS,
THURGOOD MARSHALL,
Counsel.

JOSEPH A. PADWAY,
LEE PRESSMAN,
Of Counsel.

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BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR REHEARING.

We, the amici curiae, who submit this brief in support of the petition for a rehearing, do so because we consider the issues of this case, to be of the greatest significance since

> "the proper functioning of the jury system, and indeed our democracy itself, requires that the jury be a 'body truly representative of the community', and not the organ of any special group or class." *Glasser* v. *U. S.*, decided January 19, 1942, 86 L. Ed. 405, 420.

From our examination of all the facts as set forth in the record, we cannot but conclude that the petitioner was convicted of murder in the first degree and condemned to death by a jury from which all persons, who were in the same economic class as the petitioner, were systematically

excluded, and that petitioner's rights, guaranteed by the Fourteenth Amendment of the Constitution of the United States, were thereby violated. It would seem that the jury which convicted petitioner, and from which all non-payers of poll taxes had been systematically excluded, could not have been unbiased. Such a jury by its very composition must have had ingrained biases and prejudices.

> "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Strauder* v. *West Virginia,* 100 U. S. 303, 309; 25 L. Ed. 664, 666.

We, who have followed this case, know the long, tedious and expensive procedure, the petitioner and his friends were put to, in order to assert those rights guaranteed by the Constitution, and when all State remedies were exhausted and the petition for a writ of certiorari was presented to this Court, we hoped for the granting of the same. The Court, by its order of May 5, 1942, nevertheless denied the petition without opinion.

The Court's denial of the petition without opinion leaves important constitutional questions unanswered.

Two possible reasons may be advanced for the denial of the petition for certiorari. One, that it is constitutional to exclude systematically from a jury, persons of the same economic class as the petitioner; and the other, that even if this be unconstitutional, the procedural error made by the attorneys for the petitioner can never be corrected and the petitioner must die solely for his attorneys' error.

If the Court will expressly indicate that the Fourteenth Amendment cannot be used by the petitioner to prevent the exclusion of 80 per cent of the otherwise eligible fellow citizens of his community to sit in judgment at his trial,

because they did not and could not pay a poll tax, then Odell Waller, his counsel and the State of Virginia will at least have certainty of the law. If, on the other hand the Court will expressly indicate that systematic exclusion of non-poll tax-payers is a violation of the Fourteenth Amendment, but that the failure of petitioner's attorney, to offer proof before trial of the specific facts of such systematic exclusion, was a fatal, uncorrectible error, again certainty of the law should at least tend to protect others against such uncorrectible errors, and relieve this Court of the burden of futile appeals for their correction.

It can be readily seen that the denial of the petition has placed a tremendous burden not only on the petitioner, and those public minded persons who have interested themselves in this case, but has also affected the State of Virginia and all future defendants in criminal trials who shall ask for a jury composed of a cross section of the community and from which the economic depressed will not be excluded. To have denied the petition without opinion was to aggravate the situation by leaving wholly undecided the questions whether such constitutional rights even exist, and if so, what is the appropriate remedy for their violation.

In conclusion, we are joining in this petition for a rehearing, because

1. We cannot believe that this Court is impotent not only to safeguard the petitioner's constitutional rights, but also to indicate how this right of trial by an impartial jury may be concretely sought for in the State and Federal courts. We believe that to secure the rights given Odell Waller under the Fourteenth Amendment, the fundamental fairness essential to the very concept of justice demands that where constitutional issues of importance are raised and recognized by trial and appellate courts, mere technical errors of procedure by counsel, should be disregarded.

2. We believe that the rights which were denied Odell Waller are intrinsically bound up with our democracy, and that as this Court stated in the case of *Glasser* v. *U. S.*, *supra*, at page 420,

> "But even as jury trial, which was a privilege at common law has become a right with us, so also, whatever limitations were inherent in the historic common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is, have developed in harmony with our basic concepts of democratic society and a representative government. For 'it is part of the established tradition in the use of juries as instruments of public justice, that the jury be a body truly representative of the community.'" *Smith* v. *Texas*, 311 U. S. 128, 130; 61 S. Ct. 164, 165.

It is respectfully submitted, therefore, that the petition for rehearing prayed for be granted.

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